Supreme Court, U. S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,
Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 29, 1980.

STATEMENT OF QUESTIONS PRESENTED

I.

Whether Congress, in enacting 42 U.S.C. § 1988, intended to abolish the doctrine of judicial immunity with respect to judicial officers who are charged with committing civil rights violations while acting in their judicial capacities, thus subjecting judges to liability for attorney's fees; if Congress did so intend, whether it had the power under the Constitution of the United States to create such liability.

II.

Whether plaintiffs may recover attorney's fees under 42 U.S.C. § 1988 where they, in fact, incurred no fees in their civil rights action and no public policy will be advanced by the award.

III.

Whether the plaintiffs in a civil rights action can be deemed "prevailing parties" for purposes of 42 U.S.C. § 1988

where the plaintiffs stipulate to the dismissal of the action as moot, the order dismissing the case expressly omits a finding of any wrongdoing by the defendant judicial officers, and the record does not contain evidence of a causal relationship between the suit and the circumstances which gave rise to the dismissal for mootness.

IV.

Whether attorney's fees may be awarded under 42 U.S.C. § 1988 against a State or state agency where neither the State nor the state agency was a party to the underlying suit, neither was given notice of an intention to seek to charge them with liability for attorney's fees, and neither has had an opportunity to be heard in opposition to an award of fees.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, the Honorable William W. Knox, at No. 78-267 dated May 24, 1979, a copy of which is included in the Appendix, is not officially reported.

The opinion of the United States Court of Appeals for the Third Circuit, at No. 79-1923 dated July 29, 1980, a copy of which is included in the Appendix, is not yet officially reported.

STATEMENT OF JURISDICTION

1. The Order of the United States Court of Appeals for the Third Circuit dated July 29, 1980, from which this Petition for Certiorari is taken, was entered on July 29, 1980.

2. The Supreme Court of the United States is authorized to hear the appeal in this case by 28 U.S.C. § 1254(1) (1976).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND LAWS

Federal

U. S. Const. art. IV, § 4

U. S. Const. amend. XI

28 U.S.C. § 1291 (1966)

29 U.S.C. § 216(b) (1970)

29 U.S.C. §§ 621-634 (1975)

42 U.S.C. § 2809 (1973)

42 U.S.C. § 1983 (Supp. 1980)

42 U.S.C. § 1988 (Supp. 1980)

State

Pa. Const. art. V, § 1

Pa. Const. art. V, § 10

Pa. Const. art. V, § 18

The Public Welfare Code, Act of June 13, 1967, P. C. 31 (62 P.S. § 101 et seq.)

42 Pa. C.S. § 1901 et seq. (1980)

Code of Virginia § 54-48 (1950)

STATEMENT OF THE CASE

This case involves liability for attorney's fees under The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1980) ("§ 1988"). The principal question is whether, as the district court herein held, judicial officers of a state are protected by the doctrine of judicial immunity from liability for fees where the act or omission complained of was done in the judicial capacity of such officer, or whether, as the circuit court held, judicial immunity has no place in a proceeding under § 1988.

Procedural Background (the suit under § 1983)

On March 10, 1978, the plaintiffs filed a Complaint in the District Court of the United States for the Western District of Pennsylvania for declaratory and injunctive relief against nine district justices of Beaver County, Pennsylvania, the petitioners herein. The plaintiffs were represented by attorneys from the

Neighborhood Legal Services Association.[1] The complaint averred the plaintiffs were indigent defendants in criminal proceedings before the district justices, and had been sentenced to prison by them after hearings in which the defendants had not been represented by counsel or informed of their right to counsel, all in violation of the Constitution of the United States as interpreted by the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972). The complaint requested declaratory and injunctive relief under 42 U.S.C. § 1983 (Supp. 1980) ("§ 1983") and was in the form of a class action under Fed. R. Civ. P. 23.

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[1] Neighborhood Legal Services Association is an organization created to render legal services to indigent persons pursuant to the Social Security Act, 42 U.S.C. § 2809 (1973) and Article IV of the Public Welfare Code, Act of June 13, 1967, P.L. 31 (62 P.S. § 101, et seq.)

On April 7, 1978, the district justices filed a motion to dismiss the complaint on the ground that the district court should abstain from the case. The motion was signed by the attorney for the district justices, who was a Philadelphia lawyer on the staff of the Court Administrator of Pennsylvania.[2] The motion to dismiss was denied by an order entered May 31, 1979.

Thereafter, the plaintiffs moved to maintain the action as a class action, for leave to file an Amended Complaint, and for a preliminary injunction. At the time fixed for argument on the class action issue, the court instead held a status conference. On this occasion, with the encouragement of the district court, the parties agreed that the dispute between them could probably be

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2 Later, on June 15, 1978, the additional appearance of a Beaver County, Pennsylvania, lawyer was entered for the district justices.

settled.[3] [53a-54a; 59a-62a].

On October 18, 1978, the district justices filed a "Motion to Dismiss Due to Mootness", alleging that the district justices were complying with Argersinger, supra, and with the Pennsylvania Rules of Criminal Procedure designed to implement that decision;[4] that indigent defendants before the district justices of Beaver County were being afforded legal counsel by the Public Defender of Beaver County; and that the issues set forth in the complaint were moot.[5] [63a-69a]. The motion was unopposed,

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3 Bracketed citations throughout this Statement of the Case refer to pages in the appendix which was filed by respondents in the Court of Appeals.

4 See Pa. R. Crim. P. 65, 316 and 318.

5 The plaintiffs' answer to the motion, while admitting the factual averments, disavowed any implication in the motion that past violations had not occurred.

and on October 20, 1978, the district court entered an order dismissing the complaint for mootness. [72a]

Attorneys' Fees Award Proceedings (the claim under § 1988)

The present stage of this case commenced on December 11, 1978, when the plaintiffs filed a motion for costs and attorneys' fees pursuant to § 1988.[6] The motion contained no indication of the party or parties from whom the fees were sought. [73a-79a].

On March 27, 1979, a hearing was held on the motion, at which testimony was given by a lawyer on the staff of Neighborhood Legal Services Association, who had acted as attorney for plaintiffs in the § 1983 proceeding. He testified to the alleged

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6 The Civil Rights Attorneys' Fees Awards Act of 1976 amended 42 U.S.C. § 1988 to provide in relevant part: "In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

derelictions which led to the filing of the complaint and to the developments which led to the motion to dismiss for mootness. [99a-110a] He stated that subsequent to the entry of the order dismissing the case, he personally knew of only one problem concerning Argersinger. [105a] The district justices stipulated to the reasonableness of the amount of fees requested and submitted no evidence in opposition to the motion. [117a-118a]

On May 24, 1979, the district court entered a Memorandum Opinion and Order denying the motion for attorney's fees. The court's order was based primarily on the doctrine of judicial immunity:

> We hold in this case that discretion should be exercised not to award counsel fees against members of the state judicial system who have no funds from which to pay it other than funds of their office, that to do so would undermine the whole reasoning against [sic] judicial immunity and inhibit them in the exercise of their official functions as judges for fear of possible payment of counsel fees and possible lawsuits. [128a]

In its Memorandum Opinion the district court gratuitously observed that the plaintiffs were the prevailing parties.

The plaintiffs took a timely appeal to the Court of Appeals for the Third Circuit. Jurisdiction of the appeal existed pursuant to 28 U.S.C. § 1291 (1976). On July 29, 1980, that Court reversed the decision of the district court, ruling that "judicial immunity is not a factor to be considered under § 1988." Slip opin. at 8. The court also rejected the defendants' alternative positions in support of the district court's order denying the application for fees.[7] The case was remanded to the district court for a determination of who should be directed to pay the award of fees, and for the entry of a proper decree.

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[7] The alternative grounds for affirmance of the district court's order of dismissal are discussed in parts II, III and IV of this petition, infra.

The district court was authorized, if it saw fit, to give further consideration to the reasonableness of the amount of fees claimed, notwithstanding that this had not been an issue in the trial court. A stay of the Circuit Court's mandate has been obtained to allow the filing of this Petition for Certiorari.

ARGUMENT

I.

The Doctrine of Judicial Immunity Bars an Award Against Judges for Attorney's Fees Under 42 U.S.C. § 1988.

The doctrine of judicial immunity to suit because of acts or omissions in the course of a judge's official duties is firmly rooted in the common law. See, e.g., Bradley v. Fisher, 13 Wall. 335 (1872). The doctrine has been applied many times in litigation under the Civil Rights Act, 42 U.S.C. § 1983. See Pierson v. Ray, 386 U.S. 547 (1967); cf. Owens v. City of Independence, 444 U.S. 822 (1980). See also Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967) and cases collected therein at 586 n.7. In Bauers the Court of Appeals for the Third Circuit, arguing from this Court's opinion in Tenney v. Brandhove, 341 U.S. 367 (1951), held that the conclusion was "inescapable" that § 1983 "was not intended to be in derogation of the common law", id. at 588, and so expressly overruled its contrary decision

in Picking v. Penna. R.R., 151 F.2d 240 (3d Cir. 1945). At issue in the present case is whether by enacting the Attorneys' Fee Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1980) ("§ 1988"), as an aid to the vindication of civil rights protected by 42 U.S.C. § 1983 (Supp. 1980) ("§ 1983"), Congress intended to abrogate the judicial immunity doctrine with respect to fee awards.

This question -- whether a judicial officer acting in a judicial capacity may be saddled with a civil rights plaintiff's legal fee -- is one of obvious importance; it affects the very foundation of the judicial system of this country -- the basic independence of our judges. This Court has not yet decided the issue, although it was adverted to in the recent decision in Supreme Court of Virginia v. Consumers Union of the United States, _____U.S._____, 100 S. Ct. 1967 (1980). The opinion in that case is instructive in the present context.

In Consumers Union, the district court determined that the rule which prohibited attorney advertising contained in the Virginia Code of Professional Responsibility (State Bar Code) violated § 1983. The court therefore issued an injunction against the Supreme Court of Virginia restraining that court from enforcing the offending rule. On a subsequent application pursuant to § 1988, the district court awarded attorneys' fees to the plaintiffs against the justices of the Virginia Supreme Court in their official capacities.

On appeal this Court examined the peculiarities of the Virginia State Bar Code and noted that by Section 54-48 of the Code of Virginia (1950), "the State has vested in the Court virtually its entire legislative or regulatory power over the legal profession." _____U.S. at _____, 100 S. Ct. at 1969. The Court concluded that the Virginia Supreme Court, in promulgating its rules under the Code, had acted in a legislative capacity. "[P]ropounding

the [State Bar] Code was not an act of adjudication but one of rulemaking." _____U.S. at _____, 100 S. Ct. at 1974. Under this Court's earlier decisions, it had been established that the doctrine of legislative immunity barred suits under § 1983 for acts taken in a legislative capacity, whether the relief sought was injunctive in nature or an award of damages. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). The Court in Consumers Union thus held that "the Virginia Court and its members are immune from suit when acting in their legislative capacity", _____U.S. at _____, 100 S. Ct. at 1975, and that an award of attorney's fees under § 1988 could not be "premised on acts or omissions for which appellants enjoyed absolute legislative immunity." _____U.S. at _____; 100 S. Ct. at 1978.

In addition to legislative functions

relative to the governance of the legal profession, the Virginia statute conferred upon the Supreme Court of Virginia responsibility for the enforcement of its rules concerning lawyer conduct. With respect to this function, this Court held that legislative immunity did not apply, and that the Virginia Supreme Court justices were subject to suit under § 1983 in their official capacities for actions taken by way of enforcement of such rules. By the same token, the Court stated that an award of attorneys' fees premised on enforcement activities would also have been proper. Since, however, the district court had based its award of attorneys' fees on the Virginia court's legislative activities, this Court vacated the fees award and remanded the case for further proceedings.

In light of this disposition, it was unnecessary for this Court to decide whether judicial immunity bars an action for prospective relief under § 1983 or for attorneys' fees under § 1988 against a judge

acting in his judicial capacity. These questions were therefore specifically reserved. _____U.S. at _____, 100 S. Ct. at 1976.

The case at bar squarely raises the question whether judicial immunity bars an award of attorneys' fees under § 1988.[8] There can be no question that the alleged acts or omissions of the district justices upon which an award would be based -- failure to warn criminal defendants that they were entitled to be represented by counsel, and that, if the defendants were indigent, counsel would be supplied free of charge to them -- were judicial acts or omissions within the jurisdiction of the judicial officers

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8 This question did not arise at the § 1983 stage of this case; the suit under that section was dismissed as moot before trial, and the defendant justices had not raised the immunity defense at that time. It was raised at the later § 1988 stage of the case, and was the basis of the district court's decision.

who made them.[9]

We earnestly submit that this Court should issue a writ of certiorari in this case to answer the question which was raised but not decided in Consumers Union, and which has now been decided by the Third Ciucuit. To leave the issue undetermined by this Court will result in continued uncertainty and substantial harm to the judicial system as judges are forced to make decisions under the ever-present threat of suits and subsequent fee requests.

A. Judicial Immunity

In Bradley v. Fisher, supra, the defendant was a justice of the Supreme Court of the District of Columbia who had presided over the trial of John H. Suratt, who was accused of having murdered President Lincoln. At the conclusion of the trial, the judge ordered the name of the defendant's attorney

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9 The District Justices of Pennsylvania are judicial officers. Pa. Const. art. V., § 1.

stricken from the rolls of those permitted to practice before the court.

The lawyer sued the judge for damages; the defense was judicial immunity. After the lower court refused to admit all of the evidence proffered by the plaintiff, the plaintiff appealed. This Court held that the judge was protected from liability for damages by virtue of judicial immunity. The importance of that immunity was said to inhere in the functions which it performed. First, said the Court, immunity ensures that a judge is "free to act upon his own convictions, without apprehension of personal consequences to himself." 13 Wall. at 347. Second, immunity serves to protect judges from harassing and vexatious litigation.

The Court in Bradley made it clear that immunity from suit did not mean that erring judges could not be disciplined. On the contrary, the Court explained:

> In this country the judges of the superior courts of record

> are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. . . .
>
> * * *
>
> [F]or malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other forms as may be specially provided.

13 Wall. at 350, 354.

Almost a century later, in Pierson v. Ray, 386 U.S. 547 (1967), this Court considered whether Congress had intended to abrogate the common law doctrine of judicial immunity with respect to liability for damages under § 1983. In words which have significant import for this case, the

Court rejected such a notion:

> Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

386 U.S. at 554-55.

To permit an award of attorneys' fees against a judge under § 1988 would also frustrate the purpose of judicial immunity by weakening the independence of judges and by exposing judges to harassment. The arguments to the contrary rest on two fictions:

(1) The fiction that attorneys' fees are not damages.

Under § 1988, attorneys' fees can be awarded "as costs." Nevertheless, unlike customary and traditional litigation costs, attorneys' fees can be substantial. This proposition needs no documentation, especially in the context of a class action. The potential severity and consequences of an award of counsel fees are not one whit

lessened by application of the label "costs." The threat to a judge of such a penalty is particularly dangerous where one of the parties in the original suit before the court is more likely than the other party to seek relief against the judge, as, for example, where the case pits a private person against some arm of government. The slightest subconscious fear of suit because of judicial error or oversight can play subtly on a judge's decision.

This threat is also present in cases where the issues are very close, and irrelevant pressures might mean the difference in the way the judge decides. The role of the immunity doctrine in helping to achieve total impartiality in difficult cases was emphasized by this Court in Bradley v. Fisher, supra:

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence

> and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge.

13 Wall. at 348.

This Court recognized the potential problem of including non-traditional litigation expenses in the category of costs in Hutto v. Finney, 437 U.S. 678 (1978). In that case, the Court held that the Eleventh Amendment to the Constitution of the United States did not bar an award of attorney's fees under § 1988 against state prison officials acting in their official capacities.[10] The Court explained

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[10] The Court in Hutto was concerned with two distinct awards of attorney's fees. The first was for legal services rendered at the trial level, and was made (prior to the 1976 amendment to § 1988) pursuant to a court's "unquestioned power to award attorney's

(FOOTNOTE 10 CONTINUED)

that assessment of costs against state officials had traditionally been made without reference to the Eleventh Amendment. The Court acknowledged, however, that the definition of costs could not be expanded to permit the wholesale imposition of staggering financial burdens on the States: "[W]e do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." 437 U.S. at 697 n. 27.

The fictional character of imposing attorney's fees as legitimate costs of litigation is particularly apparent in this case, where the plaintiffs were represented by a law organization which receives funding

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FOOTNOTE 10 CONTINUED

fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." 437 U.S. at 689 n.14. The second award was for legal services rendered on appeal and was made pursuant to § 1988, which was enacted during the pendency of the lawsuit.

from the federal government and from the Commonwealth of Pennsylvania, and the plaintiffs incurred no legal fees. There is thus no element of reimbursement in any award, which must be equated to damages or a penalty.[11]

The purposes served by the doctrine of judicial immunity are, of course, different from those served by the Eleventh Amendment, and, therefore, Hutto is not controlling here. Judicial immunity preserves the independence of judges and protects them from harassment. The imposition of attorney's fees on judges would defeat these purposes to no less a degree than would the imposition of damages.

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[11] In Part II, infra, the argument is made that § 1988 does not apply where no legal fees are incurred.

(2) The fiction that the imposition of attorney's fees on judges will not affect their independence or result in harassment because the governmental units which they serve will actually pay the awards

Under Hutto v. Finney, supra, awards against state officials in their official capacities are to be paid by the states.[12]

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[12] The case at bar permits this Court to reexamine part IIB of its opinion and decision in Hutto v. Finney, 437 U.S. 678 (1978), should it desire to do so. That portion of the Court's opinion caused sharp division in the Court. The petitioners in this case, appellees below, did not, of course, ask the Third Circuit Court of Appeals to overrule the Supreme Court's decision in Hutto. Nonetheless, the issue was touched upon in the briefs below, and the Court of Appeals did confront the question: "Moreover, contrary to some suggestions in the briefs, the eleventh amendment is not a bar to an award of attorney's fees under § 1988 (citing Hutto)." Slip opin. at 6. The case at bar presents the question of Eleventh Amendment immunity at a more advanced stage than Hutto, since in argument in the Court of Appeals the respondents seem to have singled out a particular state agency (the Administrator of the State Courts) which they believe should be responsible for an award. Neither they nor the Court of Appeals, however, are definite in this regard, and both would find an award against other repositories of state funds equally satisfactory. As discussed in part IV of this petition, infra, an award against any state agency without notice or opportunity to be heard raises important questions of due process as well as questions involving the Eleventh Amendment.

Therefore, argued respondents in the Court of Appeals, judges would not be affected in their decisions on the merits by the prospect of a possible future suit and an award of attorney's fees.

We submit, however, that the notion that a judge's independence would be assured because his public employer would pay the award brought about by his mistake or misconduct is a cynical one, to say the least. No conscientious jurist could be comforted by the fact that the citizens of a state which he serves would have to pay for his dereliction. As observed above, this is especially true where the judge knows, consciously or subconsciously, that a decision against one party is much more likely to result in a suit and subsequent fee request than would a decision against the other party.[13]

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13 Furthermore, freedom from payment of the ultimate fee award does not forestall harassment in the form of the lawsuit itself.

(FOOTNOTE 13 CONTINUED)

FOOTNOTE 13 CONTINUED

Judicial immunity was not raised in the district court as a defense to the § 1983 action for prospective relief, and in fact no prospective relief was awarded. Therefore, this case does not strictly raise the question whether judicial immunity bars suits for prospective relief against judges. The decision in the circuits are in conflict. Compare Williams v. Williams, 532 F.2d 120 (8th Cir. 1976); Cheramie v. Tucker, 493 F.2d 586 (5th Cir.), cert. denied, 419 U.S. 868 (1974); Mirvin v. Justices of the Supreme Court of Nevada, 415 F. Supp. 1178 (D. Nev. 1976), with Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Supreme Court of Virginia v. Consumers Union of the United States, _____U.S._____, 100 S.Ct. 1967 (1980), contains intimations that an award of attorney's fees is barred by immunity doctrines only if prospective relief is so barred. Petitioners contend that this conclusion does not necessarily follow from the premise. As discussed throughout this portion of this petition, there exist good reasons for barring awards of attorney's fees which do not apply to awards of prospective relief.

Petitioners would contend, however, that the doctrine of judicial immunity bars suits for prospective relief. The contrary decision permits harassment of judges and forces judges to take precious time from their judicial duties to defend the lawsuits against them. The considerations which led this Court to conclude in Consumers Union that legislative immunity bars suits against legislators for prospective relief apply equally to judicial immunity. See Pierson v. Ray, supra.

Moreover, the argument that the purpose of immunity is achieved because the district justices might not personally have to pay a fee award would apply equally to an award of damages. But public policy considerations do bar a judgment for damages against a judge, regardless of his personal obligation to pay the amount of the judgment, and the same considerations should bar an award of attorney's fees also.

B. The Legislative History of § 1988

The Court of Appeals concluded that Congress intended to abrogate judicial immunity as a defense to an action under § 1988. The Court believed that this conclusion was compelled by the inclusion of a citation to Pierson v. Ray, 386 U.S. 547 (1967), in a footnote in the House Committee Report relating to § 1988. In so ruling, we respectfully submit, the Court below erred.

The relevant portion of the text of H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. at 9, (hereinafter "House Report") is to

be found in a passage dealing with the element of "reasonableness" of fees to be allowed to prevailing parties, and is as follows:

> [W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. . . .

Footnote 17 consisted solely of three case citations, viz., Wood v. Strickland, 420 U.S. 308 (1975), Scheuer v. Rhodes, 416 U.S. 232 (1974), and Pierson v. Ray, supra. Wood v. Strickland and Scheuer v. Rhodes deal primarily with questions of official (non-judicial) immunity. Pierson v. Ray deals both with the immunity of a municipal judge from suit for damages under § 1983 (this Court reaffirming such immunity) and with the

special defenses available to police officers in a § 1983 suit (this Court holding that the defenses of good faith and probable cause to arrest are available).[14]

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[14] Pierson v. Ray arose when black civil rights leaders intentionally entered segregated facilities for whites in Jackson, Mississippi. They were arrested by police and convicted by a municipal police justice for causing a disturbance of the peace. During a trial de novo in the general trial court, one of the accused was granted a directed verdict, and the cases were dropped against the other defendants.

Subsequently, the defendants brought actions against the arresting officers and the municipal police justice for damages under § 1983. A jury trial resulted in a verdict for the defendants, and judgments were entered on the verdicts. On appeal, the Court of Appeals for the Fifth Circuit held that the municipal judge was protected from suit by judicial immunity. The Court also held that the police officers were not entitled to the common law defenses of good faith and probable cause.

Accepting the case on certiorari, this Court affirmed the decision of the Court of Appeals that the municipal judge was immune from suit. As to the police officers, however, this Court held that the defenses of good faith and probable cause were available to them in actions under § 1983.

Since Pierson v. Ray is the only case of the three cited which deals with the doctrine of special defenses, we think it logical to conclude that Pierson v. Ray was cited in the footnote as an example of cases affording the "special defenses" referred to in the quoted passage, rather than for its holding on judicial immunity. In any event, there is no basis for concluding that the footnote indicates a Congressional intent to abrogate judicial immunity.[15]

In short, the court of appeals, basing its decision upon nothing more than an ambiguous footnote in a report of the House of Representatives, leaped to the conclusion that judicial immunity had been abrogated in this class of cases. Before a doctrine so fundamental to our system

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15 The court of appeals seemingly found significance in the citation to Pierson v. Ray in that this Court there held that Congress had power to abrogate judicial immunity. The citation was taken to indicate that "Congress has exercised the choice left to it by Pierson in enacting § 1988." Slip opinion at 7-8.

of jurisprudence is jettisoned, the policy considerations discussed above should at least be considered.[16]

C. Constitutional Considerations

In Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967), the Court of Appeals raised an important question which must be answered before § 1988 can be construed to have abrogated judicial immunity. The court noted that judicial immunity is inherent in the concept of an independent judiciary, and that an independent judiciary, in turn, is essential to the republican form of government. A republican form of government is guaranteed to every State in Art. IV, § 4 of the Constitution of the United States. Any statute which abrogates

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16 "[I]t is well settled that a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." Bauers v. Heisel, 361 F.2d 581 at 587 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967).

judicial immunity, therefore, may have thereby violated the Guarantee Clause, and be unconstitutional.

Although the Court of Appeals in Bauers v. Heisel, supra, noted this difficult question, the same court in the present case ignored the problem. Instead, as above noted, the court concluded without discussion that the Supreme Court had decided in Pierson v. Ray, supra, that Congress has the power to abolish judicial immunity. This conclusion, we submit, was unwarranted in light of the strong support which Pierson v. Ray itself supplies for the inviolability of the doctrine of judicial immunity, whether with respect to suits for damages or for equitable relief, and in view of the express reservation of the immunity question in Consumers Union, supra.

II.

No Justification Exists in this Case for Allowing an Award of Attorney's Fees to Litigants who did not Actually Incur any Fees.

The plaintiffs in this case were represented by an attorney from a publicly funded law firm which renders legal services to indigent people, and which receives all of its funding from the Commonwealth of Pennsylvania and the federal government. It is not claimed that either he or Neighborhood Legal Services charged the plaintiffs anything whatever for their services; thus plaintiffs are neither out-of-pocket or in debt for any attorneys' fees. Nevertheless, the Court of Appeals held that a fee award is proper, relying on its decision in Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978). We have serious question as to the correctness of this aspect of the Rodriguez decision, but in any event submit that reliance on it in the present case is misplaced.

In Rodriguez, the plaintiff, a victim of age discrimination in his quest to become a security officer for the City of Philadelphia, was represented by attorneys from Community Legal Services, Inc., (the Philadelphia counterpart of Neighborhood Legal Services) in prosecuting a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1975). The trial court awarded attorneys' fees based on 29 U.S.C. § 626(b) (1975) and 29 U.S.C. § 216(b) (1970), which provide: "The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." (Emphasis supplied.) On appeal, the Court of Appeals noted the mandatory language of the statute and held that neither federal law nor its own charter barred Community Legal Services from obtaining an award of fees.

Two justifications were offered by the Court of Appeals for its decision in Rodriguez, but even if valid in the context

of that case, and this is questionable, neither is apposite here. First, the court noted that such awards act as a deterrent to future misconduct. A deterrent is not needed or meaningful, however, where, as here, the alleged civil rights violations by the defendants are not shown to be intentional or in bad faith. Moreover, as noted previously, here the original suit under § 1983 was never brought to trial, but was dismissed as moot on the ground that the practice complained of would not, in any event, recur.[17]

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17 Deterrence as a reason for a counsel fee award seems particularly inappropriate where judicial officers are concerned. As Bradley v. Fisher, supra, noted, such officers are appropriately to be disciplined by way of impeachment "or such other form as may be specially prescribed." 13 Wall. at 354. In Pennsylvania the remedy of impeachment has been supplemented, if not supplanted, by proceedings before a constitutionally created Judicial Inquiry and Review Board. Pa. Const. Art. V., § 18. See also Rules of Procedure for the Judicial Inquiry and Review Board, promulgated by the Supreme Court of Pennsylvania, June 27, 1969, 434 Pa. lxxxii; Desk Copy, Pennsylvania Rules of Court 87 (West, 1980); Annual Report of the Judicial Inquiry and Review Board for 1978, as contained in the Report of the State Court Administrator for 1978. Furthermore,

(FOOTNOTE 17 CONTINUED)

Second, the court in Rodriguez reasoned that awarding fees to public interest law firms would permit them to engage in more litigation to vindicate the policies of the Age Discrimination in Employment Act. This may be a proper consideration when applied to an employer-defendant under that statute, but it is totally without merit when the claim for fees is against a state judicial officer or a state government or an arm thereof; the government, like the public interest law firm, is in the business of providing services to the public and is also limited in its available resources. These resources must be budgeted among various Commonwealth agencies, including the

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FOOTNOTE 17 CONTINUED

the conduct of district justices such as the petitioners in this case is further regulated by the Rules Governing Standards of Conduct of Justices of the Peace promulgated by the Pennsylvania Supreme Court on February 1, 1973, 450 Pa. xxix, Pennsylvania Rules of Court, supra, at 63. Rule 17 of said rules provides that president judges of courts of common pleas shall exercise general supervision and administrative control over justices of the peace within their judicial districts.

agency which funds the Neighborhood Legal Services Association, by whom the plaintiffs' attorneys are employed.

An award in this case, presumably, would result in a smaller budgetary allocation from the Commonwealth of Pennsylvania to Neighborhood Legal Services next year. Thus, the only accomplishment of an award would be to embarrass the judges on whose conduct the award is based, to make them more sensitive to the dangers of ruling against clients of Neighborhood Legal Services in future cases, and to engender a needless and wasteful recycling of public monies.

In conclusion on this aspect of the case, it must be emphasized that the Civil Rights Attorneys' Fees Awards Act of 1976 is, in the words of the Senate Report, "designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the Civil Rights Acts. . . . [F]ee awards have proved an essential remedy if private

citizens are to have a meaningful opportunity to vindicate [congressional policies in these acts]." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 1976 U. S. Code Cong. & Admin. News 5908, 5909-10 (hereinafter "Senate Report"). There then appears the following paragraph which we quote in full:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the laws has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Senate Report, supra, at 5910. (Emphasis supplied.)

It is clear that an award of fees under § 1988 is intended as a "remedy," where needed, to allow suit to be brought; it is intended to reimburse the prevailing plaintiff; it is not intended to compensate a lawyer or agency whose duty it is to represent and who does represent a plaintiff

without charge; it is not intended to give a windfall to a litigant who has not incurred counsel fees or the threat of fees in his quest for vindication. Finally, it should not be overlooked that relief under § 1988 is discretionary with the court, whereas the statute in Rodriquez, supra, mandates an allowance of fees. The concluding portion of the Senate Report cites cases in other types of federal litigation in which counsel fees have been awarded. "These cases", says the report, "have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." Senate Report at 5913. Substantially the same language is to be found in the House Report at 9. In the instant case, no fee award is necessary to attract competent counsel and § 1988 is not applicable. Since vindication of their rights costs nothing, respondents need "no opportunity to recover what it costs them." Senate Report, supra, at 5910.

Because the Court of Appeals has decided an important and recurring question under § 1988 through misplaced reliance on a decision construing another, differently worded, statute and in a way which, we submit, distorts the purpose of § 1988, we believe this Court should address the issue.

III.

The Plaintiffs were not Prevailing Parties and are Therefore Not Entitled to an Award of Attorneys' Fees.

Under § 1988, a court may award attorneys' fees only to a "prevailing party". This phrase has been the subject of considerable recent interpretation, and the clear weight of authority holds that a party need not obtain a verdict in his favor in order to be deemed a "prevailing party" for purposes of § 1988. Thus this Court held recently that § 1988 does not condition a court's power to award fees "on full litigation of the issues or on a judicial determination that the plaintiff's

rights have been violated"; a plaintiff who prevails "through a settlement rather than through litigation" is entitled to § 1988 relief, Maher v. Gagne, _____U.S._____, _____, 48 U.S.L.W. 4891, 4893 (1980). This Court indicated last Term, however, that qualification as a prevailing party would not lightly be assumed. Hanrahan v. Hampton, _____U.S._____, 48 U.S.L.W. 3780 (1980).

The test adopted by the Third Circuit Court of Appeals for determining whether a party is a "prevailing party" (with which we have no quarrel) is whether he "fairly can be found by the district court to have essentially succeeded on such claims. . . ." Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978). See also Swietlowich v. County of Bucks, 620 F.2d 33 (3d Cir. 1980); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

Beyond the "essentially succeeded" requirement, however, it seems fairly clear that "prevailing party" status presumes a

causation element; that is, there must be a causal connection between the bringing of the civil rights suit and the obtaining of the relief. Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977); Tobeluk v. Lind, 589 F.2d 873 (Alas. 1979). In this case, the record simply does not contain sufficient evidence to allow the conclusion of the courts below that the causative element was present.

In the first place, the case charging infringement of the plaintiffs' civil rights was never tried, and it was therefore never established as a fact in the § 1983 proceeding that the district justices were guilty of the misconduct alleged. The justices in their sworn answers to the complaint had denied each such charge. This became an academic matter, however, for the parties agreed that -- whether or not there had been past violations -- in September of 1978 Argersinger and the Pennsylvania rules of conduct were being followed, and that

the case was moot. In the second place, assuming that the misconduct had taken place as alleged, claimants seeking an award of fees must have some burden of proof to show their entitlement; that is, to show that the bringing of the suit was the cause of cessation of the misconduct. Cf. Cicero v. Olgiati, 473 F. Supp. 653 (S.D. N.Y. 1979). This the present plaintiffs did not do, and the courts below erred in holding the contrary.

The facts concerning the plaintiffs' § 1983 claim are not well developed in the record.[18] From colloquy of counsel at the § 1983 status conference, it appears that during the pendency of the suit, an independent case came before Judge Rowley of the Court of Common Pleas of Beaver County. The evidence in that case indicated that a district justice had violated Argersinger and the Pennsylvania Rules of Criminal

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18 The only evidence in the entire record is the testimony of plaintiffs' attorney on the § 1988 issue of fees [98a, et seq.].

Procedure in not giving the constitutional warnings as to right to counsel. Judge Rowley set aside the summary conviction which had been entered by the district justice. [48a-49a] Thereupon, Judge Sawyer of the Court of Common Pleas of Beaver County issued a memorandum to district justices in his district (the instant petitioners) directing them to comply with the relevant Pennsylvania rules. [49a] On the basis of Judge Rowley's opinion and Judge Sawyer's memorandum (which is not of record in this case), the Plaintiffs agreed to the dismissal of their lawsuit for mootness. [70a-71a] There is no evidence in the record of any connection between Judge Rowley's opinion and Judge Sawyer's memorandum on the one hand and the Plaintiff's lawsuit on the other.

The district court's conclusion that the plaintiffs had prevailed was purely obiter dictum, unnecessary to its immunity holding and unsupported by any stated

rationale. We respectfully submit that the Court of Appeals was mistaken when it ruled that the record supports the district court's dictum.

The concept of "prevailing party" is central to the remedy afforded by § 1988. The problems of causation and burden of proof in order to qualify a party as "prevailing" are important to the proper adjudication of fee claims by the federal courts. Because the lower courts in this case gave short shrift to the problem, and in light of the plethora of cases involving the prevailing party requirement in § 1988 claims, a clarifying decision by this Court is desirable.

IV.

Considerations of Due Process and Fairness Prohibit an Award Against the State or State Agency without Giving it Notice or an Opportunity to be Heard.

After holding that an award of counsel fees was proper in the case at bar, and noting that on appeal an award

was sought against petitioners only in their official capacities, the Court of Appeals stated that the district court could fix liability for the payment of the fees upon the Commonwealth of Pennsylvania or the Administrator of the Pennsylvania Courts or the county court administrator.

> Here, as in Hutto [v. Finney, supra,] and Skehan, [v. Board of Trustees of Bloomsburg State College, 590 F.2d 490 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1980)] there are several possibilities as to how the award could be framed. For example, both the county and the state court administrator arguably could be responsible for the award. Both entered appearances in the district court and actively participated in all phases of the case, factors found to be relevant in Hutto in framing an award.

Slip opinion at 7-8.

Since this statement is an integral part of the decision of the Court of Appeals that petitioners are subject to § 1988,

and since on this record the statement is plainly erroneous, petitioners are within their rights in advancing it as an additional reason for this Court to grant this petition.

The Court of Appeals' position was apparently bottomed on this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978). There this Court held that the Department of Correction of the State of Arkansas could be compelled to pay an award of attorney's fees under § 1988 against officials of that state's prison system. The Court also stated that Arkansas could be liable for appellate attorney's fees although the state was not a formal party to the appeal. 437 U.S. at 699-700. These holdings, however, were premised on the conclusion that the action was, for all practical purposes, brought against the State of Arkansas. The State Attorney General defended the case from its beginning; the State had paid earlier fee awards; and it was the State's lawyers who decided to

bring the appeal.

In the present case, the Commonwealth of Pennsylvania and the Attorney General of that state have had nothing whatever to do with the action.[19] Contrary to the above quoted statement contained in the opinion of the Court of Appeals (slip opinion at 8), neither the administrator for the Court of Common Pleas of Beaver County, Pennsylvania, nor the State Court Administrator entered appearances in the district court and neither participated in any phase of the case. Presumably as a courtesy, the Administrator of the Pennsylvania State courts and the administrator of the Beaver County courts provided the district justices with lawyers from their offices. The lawyers entered their appearances as attorneys for the district justices, not as attorneys

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19 The Attorney General of Pennsylvania takes the position that it would violate the Pennsylvania Constitution's provision for separation of powers for the Attorney General to represent members of the state judiciary. Pa. Atty. Gen. Op. 75-9 (1975).

for the court administrators.

The State Court Administrator in Pennsylvania is a constitutional officer and his office is created by state statute. See Pa. Const., Art. V, § 10; 42 Pa. C.S. § 1901, et seq. The functions of the Administrator's office are limited to those stipulated by the Supreme Court in its Rules of Judicial Administration. See Pennsylvania Rules of Judicial Administration, Pa. Rules of Court 1 (West, 1980). The Administrator is not responsible for the judicial conduct of district justices. General supervision and administrative control over district justices has been delegated by the Supreme Court of Pennsylvania to the president judges of the courts of common pleas of each county. Rule 17 of the Pennsylvania Rules Governing Standards of Conduct of Justices of the Peace, supra n. 17. Under these circumstances, there is no rational basis on which to impose fees in this case on any governmental units

or officials as surrogates for the district justices.

Moreover, an award of attorneys' fees in this case against any governmental units or officials would not comport with the requirements of due process because none of them was provided with notice or an opportunity to be heard. It goes without saying that notice to the district justices is not equivalent to notice to the Commonwealth of Pennsylvania. Similarly, notice to the district justices' attorneys that a motion to assess fees has been filed is not equivalent to notice to the administrators by whom the attorneys are regularly employed; the existence of the employer-employee relationship was purely fortuitous.

The requirements of due process are fundamental. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or

property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). A State or state agency or subdivision, no less than an individual, is entitled to these minimum requirements. The instant record is barren of any suggestion that a claim for fees was being asserted against the State Court Administrator, the Commonwealth of Pennsylvania, the Beaver County Court Administrator or Beaver County, or that any of them has had an opportunity to be heard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

/s/ Thomas W. Pomeroy, Jr.
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Attorney for Petitioners

October 15, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1923

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated.

Appellants

v.

JOHN J. AYOOB, HUGO R. IOFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH J. LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 78-0267)

Argued February 20, 1980*

Before: SEITZ, *Chief Judge*, VAN DUSEN, *Circuit Judge*, and SHAPIRO, *District Judge***

(Filed July 29, 1980)

Thomas C. Reed (Argued)
John Dineen
Neighborhood Legal Services Association
Pittsburgh, Pa. 15219
Counsel for Appellants

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* This determination was deferred pending the Supreme Court's resolution of *Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967 (1980), because the decision there appealed considered issues presented here.

** Hon. Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Thomas W. Pomeroy, Jr. (Argued)
Ronald S. Krasnow
Kirkpatrick, Lockhart,
Johnson & Hutchison
Pittsburgh, Pa. 15222
Counsel for Appellees

OPINION OF THE COURT

PER CURIAM:

The plaintiffs appeal from an order of the district court denying their request for attorney's fees under 42 U.S.C. §1988.

I.

Plaintiffs are a class of indigents residing in Beaver County, Pennsylvania. The defendants are district justices for the county (formerly known as district magistrates). District justices are elected judicial officials, and their jurisdiction includes mainly minor civil matters and petty and/or summary criminal matters. *See* Pa. Cons. Stat. Ann. tit. 42, §1515.

In March of 1978, the plaintiffs brought this action for declaratory and injunctive relief against the defendants in their official and individual capacities. Plaintiffs challenged the defendants' alleged practice of sending convicted indigents to jail for summary or petty offenses without first affording a right to counsel where *Argersinger v. Hamlin*, 407 U.S. 25 (1972), so requires. After the action was filed, the plaintiffs' counsel had several meetings with defendants' counsel at the Beaver County court house. Although the record is not entirely clear on the point, it appears that the solicitor for the county court administrator and a representative from the state court administrator attended at least some of these meetings.

The plaintiffs' counsel testified without dispute that some time after the action was filed, the President Judge of the Beaver County Court of Common Pleas sent a letter to the defendants through the county court administrator's office instructing them to comply with *Argersinger*. There is no copy of this letter in the record. In addition, in an unrelated case in which an appeal was taken from a sentence imposed by one of the defendants, the common pleas court held that *Argersinger* had been violated.

While this action was pending, the defendants on the whole began to comply with *Argersinger*. Thereafter, the defendants moved to dismiss the case as moot. The plaintiffs did not oppose the motion, and the district court granted it.

The plaintiffs then moved for attorney's fees pursuant to 42 U.S.C. §1988. The district court denied the motion, reasoning that although the plaintiffs were prevailing parties, the defendants, as judges, were entitled to an immunity defense both in their individual and official capacities. This appeal followed.

II.

At the outset, the defendants challenge the district court's conclusion that the plaintiffs are prevailing parties within the meaning of §1988. Although the district court was rather brief in this regard, we believe that, given the record in this case, its conclusion was correct. In this circuit, the test of whether a person is a prevailing party is whether he "essentially succeeds in obtaining the relief he seeks in his claims on the merits." *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979).

Here, the district court necessarily concluded that the defendants had been violating *Argersinger* prior to this action and stopped after the action was filed. Indeed, it was hard for the court to conclude otherwise. The only evidence of record on the point is that of plaintiff's counsel, who testified that he had investigated the

matter and found violations before the action was filed but few after. The defendants introduced no testimony to contradict this. The district court thus was not clearly erroneous in concluding that the defendants had been violating *Argersinger* prior to the institution of this action and stopped afterwards.

Because the defendants stopped violating *Argersinger*, the plaintiffs received precisely the relief they wanted. Moreover, the fact that the action was dismissed makes no difference. Under §1988 the focus is on the relief received rather than any formal procedural labels. *See Bagby, supra*, 606 F.2d at 414-15; *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3846 (1980).

Defendants contend, however, that the cause of their cessation of conduct was not the filing of this action. It is true that there must be a causal relationship between the action and the ultimate relief received for a person to be a prevailing party under §1988. *See Ross, supra*, 598 F.2d at 1322. Nevertheless, the action need not be the sole cause. Where there is more than one cause, the plaintiff is a prevailing party if the action was a material factor in bringing about the defendant's action. To hold otherwise would be inconsistent with the broad remedial purpose of §1988 because in many cases causation will hinge on the defendant's motivation. To require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification.

Here, the defendants argue that this action played no part in their actions. They point to the letter sent by the president judge and the ruling of a common pleas judge that *Argersinger* had been violated in a particular case by one of the defendants. Because there apparently was no contact between plaintiffs' counsel and the president judge and because the ruling was in a separate judicial proceeding, they argue that the letter and the ruling were the sole reason they began to comply with *Argersinger*.

The defendants have failed to provide an adequate record basis for their contention. Even assuming the president judge's letter and the other judge's ruling had absolutely no connection with this action, the district court's necessary conclusion that the action was a material factor was not clearly erroneous. The plaintiffs' counsel, the only witness, testified that he communicated with some of the defendants informally prior to filing of this action. After this action was filed, counsel for both sides met and discussed the case.

This sequence of events strongly suggests that the action was a material factor in bringing about the defendants' change in conduct. Even though the defendants knew about possible violations of *Argersinger* through informal communications, they did not stop violating the case until after the action was filed and their counsel discussed the case with plaintiffs' counsel. On this record, we cannot say that the district court was clearly erroneous.[1]

Because the plaintiffs received the relief they requested and because the record supports a finding that this action was a material factor in the defendants' decision to cease the complained of conduct, we conclude that the district court was correct in holding that the plaintiffs are prevailing parties under §1988.

III.

On appeal, the plaintiffs seek attorney's fees from the defendants only in their official capacities. Thus we do not consider whether such an award would be appro-

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1. The defendants' argument on appeal as to causation is somewhat disingenuous. For example, the motion to dismiss in the district court referred to the case as being "settled." Moreover in another section of their brief on appeal urging affirmance for other reasons, they state: "Once the problem was brought to the attention of the Pennsylvania Court Administrators office and the local court administrators office, both of these offices helped the plaintiffs to obtain the relief sought."

priate from the defendants in their individual capacities. Moreover, contrary to some suggestions in the briefs, the eleventh amendment is not a bar to an award of attorney's fees under §1988. *See Hutto v. Finney*, 437 U.S. 678, 689-700 (1978). Thus the question presented is whether the doctrine of judicial immunity bars recovery of attorney's fees by a prevailing party under §1988 from judicial officers in their official capacity. We hold that it does not.[2]

The doctrine of judicial immunity is a common-law rule, and the Supreme Court has indicated that Congress may abolish the doctrine when it sees fit. *See Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). We believe that Congress has done so in §1988.

The legislative history of §1988 indicates that Congress expressly considered judcial immunity and decided to abrogate it under §1988. The House Report states:

> Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H. Rep. No. 94-1558, 94th Cong., 2nd Sess. 9 (1976). Footnote 17 contains a citation to *Pierson v. Ray*, 386 U.S. 547 (1967), the case where the Supreme Court in-

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2. A three-judge court reached the same conclusion in *Consumers Union v. Supreme Court of Virginia*, 470 F. Supp. 1033 (E.D. Va. 1979). On appeal, the Supreme Court reversed, holding that the state supreme court had been acting in a legislative capacity. The Court expressly did not reach the issue presented here. *See Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967, 1977-78 (1980).

dicated that Congress could abrogate judicial immunity. *See generally Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967, 1977-78 (1980). We believe that this is sufficient indication that Congress has exercised the choice left to it by *Pierson* by enacting §1988.

None of the defendants' arguments convince us to the contrary. First, they point out that because the plaintiffs' counsel are from a neighborhood legal services office funded with public money, the effect of attorney's fees here would be a rebudgeting of state funds by the federal judiciary.

To the extent this argument is founded on the eleventh amendment, as noted above, *Hutto, supra*, provides the dispositive answer. In addition, in *Rodriguez v. Taylor*, 569 F.2d 1231, 1244-46 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), we held that a public interest law firm could recover attorney's fees from the City of Philadelphia under the Fair Labor Standards Act. The defendants have suggested no convincing distinction between that case and this one, and we perceive none.

Finally, the defendants argue that there are insufficient funds to meet the amount of fees involved. The district court apparently accepted this argument because it stated that the budgets of the individual defendants' offices were insufficient to satisfy any award. Implicit in this statement is the premise that the award could be satisfied only from the individual budget of the office of each defendant.

Such, however, is not the case. "[W]hether or not state agencies are named as defendants in a §1983 action, [§1988] contemplates that the prevailing plaintiff may recover fees from the individual defendants in their official capacities or directly from the state agencies." *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 796 (3d Cir. 1978). *See Hutto, supra*, 437 U.S. 699-700.

Here, as in *Hutto* and *Skehan*, there are several possibilities as to how the award could be framed. For exam-

ple. both the county and the state court administrator arguably could be responsible for the award. Both entered appearances in the district court and actively participated in all phases of the case. factors found to be relevant in *Hutto* in framing an award. *See* 437 U.S. at 699. The plaintiffs and the defendants have made numerous arguments concerning how the award should be framed. Because the district court proceeded on an erroneous legal premise as to how the award might be framed. we feel it would be better for the district court to consider these arguments in the first instance.

We hold that judicial immunity is not a factor to be considered under §1988. We will remand to the district court to consider in the first instance the proper framing of the award of attorney's fees. We also note that the parties have stipulated the amount of fees and have raised no issue concerning this on appeal. We leave to the district court whether it nevertheless desires to amplify the record to determine the reasonableness of the fee. We also leave open whether the plaintiffs may recover fees in connection with this appeal.

IV.

The order of the district court will be reversed and remanded.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICIA MORRISON, et al	)	
v.	)	Civil Action No. 78-267
JOHN AYOOB, et al	)	

Dated: May 24 , 1979.

MEMORANDUMN OPINION RE: COUNSEL FEES

This action was brought by plaintiffs on behalf of themselves and others as a class action complaining that the defendants who are district justices or magistrates in Beaver County, Pennsylvania have been depriving people of their rights to counsel under Argersinger v. Hamlin, 407 US 25 (1972). It is alleged that notwithstanding the decision of the U.S.Supreme Court, the justices have been jailing people in minor and summary offenses without the benefit of counsel as required by the Supreme Court. It would appear also that the actions of the justices if true would be in violation of Pennsylvania Rules of Criminal Procedure No. 65, 315, 316 and 318 which are appeared to be tailored to meet the requirements of Argersinger.

The case progressed to the point where the Administrative Office of the Courts in Beaver County and the President Judge thereof admonished the district justices that they had to comply with the requirements of the Pennsylvania Supreme Court and with the requirements of Argersinger and the practices thereupon ceased with one alleged exception. It appearing that there was at that time no need for further action, either for declaratory

or injunctive relief by this court,which was the relief sought, with the consent of the plaintiffs, the court dismissed the action as moot the plaintiffs only consenting to dismissing for mootness.

Plaintiff's counsel being the Neighborhood Legal Services of Aliquippa,Pennsylvania in Beaver County, then presented a motion for costs and attorneys fees pursuant to 42 USC 1988 as amended by the Act of October 19, 1976 which insofar as is relevant here reads as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal REvenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The court has no hesitation in holding that the plaintiffs were prevailing parties in this case and as such are entitled to fees since as the result of action taken by them their purpose, being to secure compliance with Argersinger,what they sought was accomplished. The mere fact the case has been settled or dismissed does not preclude an award where vindication of the rights sought has been obtained. Gagne v. Mahr, 47 LW 2615 (2d cir 1979). The question is:has the suit served as a catalyst for accomplishing the desired result? Was the major objective of the suit accomplished? Fluhr v. Roberts, 463 FS 745 (W.D. Ky 1979). We therefore hold that the plaintiffs are prevailing parties.

It should be noted that there is no dispute as to the amount of attorney's fees. It was agreed by the parties at argument that the amount of $4420 was a fair amount to be

allowed for counsel fees plus $158.45 for a total of $4578.45 which was agreed to be the proper amount if any was to be awarded.

The remaining question,however,is of greater importance. The defendants were all district justices formerly known as justices of the peace in the Pennsylvania Judicial System. As such they would ordinarily be entitled to Judicial Immunity under Pierson v. Ray, 386 US 547 (1967); Stump v. Sparkman,435 US 349; Pennebaker v. Chamber, 437 F 2d 66 (3d cir 1971).

It has been held that the counsel fees section of section 1988 does apply even as against state departments and officials where the money should be paid out of funds available to the department of institution. See Hutto v. Finney, US , 57 L Ed 2d 522 holding that in a case involving prison conditions where there was a justifiable finding of bad faith, the award of attorneys fees to be paid out the state Department of Correction funds was not barred by the Eleventh Amendment. It was pointed out that the Eleventh Amendment does not prevent award of attorneys fees against officers in their official capacities. See Fitzpatrick v. Bister, 427 US 445.

We also have the Third Circuit case which we are bound to follow Skehan v. Board of Trustees of Bloomsburg State College 590 F2d 470 (3d cir December 21, 1978) holding that claims for monetary damages for back pay by a college professor who claimed discrimination should not be allowed against the college under the Eleventh amendment nor against the president thereof who was entitled to official immunity. The Skean case holds that absent a finding that individual defendants had litigated in bad faith, they would not be liable to a fee award under 1988 and the Court of Appeals

quoted from Hutto that it was manifestly unfair where individual officers have no personal interest in the conduct of the litigation to impose personal liability on them for counsel fees in the absence of bad faith because this may cause the state officers to exercise their discretion with undue timidity.

None of these cases however approaches the problem of judicia immunity. Under Pierson v. Ray and Stump v. Sparkman we hold that whether the act be regarded as performed by the district justices in their individuals capacities that no counsel fees should be awarded against them. If the costs were to be awarded against them in their official capacities it does not appear that there is any fund from which they are to be paid. An individual district justice has no funds outside those derived from payment of costs and fees pertaining to his office. Insofar as the court has been informed in this case there is no general fund for operating the state minor judicial system.)

In Universal Amusement Co. v. Vance, 559 F 2d 1286 (5th cir 1977) involving seizure of an allegedly obscene motion picture film by a county prosecutor and chief of police, it was held the Congress did intend when enacting 1988 in its present form to lift the veil of immunity from state and local governments but if the fees awarded are against persons in their individual capacities, then the court must respect the absolute immunity from money damages enjoyed by prosecutors under Imbler v. Pachtmar 424 US 409 (1976).)

It is noted that 1988 says: "that the court in its discretion may allow the prevailing party". In other words, it is obvious that the court has discretion and is not required to award counsel fees. We hold in this case that discretion

should be exercised not to award counsel fees against members of the state judicial system who have no funds from which to pay it other than funds of their office, that to do so would undermine the whole reasoning against judicial immunity and inhibit them in the exercise of their official functions as judges for fear of possible payment of counsel fees and possible lawsuits.

For these reasons we will deny the motion for counsel fees. This still leaves open the question of whether the case should be reopened as to defendant Ayoob. Except as to him, we find there was no bad faith on the defendant's part and as to Ayoob the matter is not as yet clear.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICIA MORRISON, et al	)	
v.	)	Civil Action No. 78-267
JOHN AYOOB, et al	)	

ORDER

AND NOW, to wit, May , 1979, for reasons set forth in the foregoing memorandum opinion,

IT IS ORDERED that plaintiff's motion for counsel fees be and the same hereby is denied.

U.S.District Judge

CC:

John Dineen, Esq. 266 Franklin Ave Aliquippa 15001

Jonathan Vipond, Esq. 1414 Three Penn Center Plaza Phila 19102

David Brakoniecki, Esq. 812 City County Bldg 15219

Robert Taylor, Esq. 337 Merchant St Ambridge 15003

Beaver County Court Administrators Beaver County 15009

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. art. 4, §4 provides:

> Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when Legislature cannot be convened) against domestic Violence.

U. S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. §1291(1966) provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

29 U.S.C. §216(b) (1970) provides in pertinent part:

> The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant. . . .

29 U.S.C. §626(b) (1975) provides in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.

42 U.S.C. §2809 (1973) provides in pertinent part:

> (a) In order to stimulate actions to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director may develop and carry on special programs under this section . . . . Programs under this section shall include those described in the following paragraphs:
>
> * * * *

(3) A "Legal Services" program to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, legal counseling, education in legal matters, and other appropriate legal services.

42 U.S.C. §1983 (Supp. 1980) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988 (Supp. 1980) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for

the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pa. Const. art. V, §1 provides:

> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const. art V. §10 provides in pertinent part:

> (b) The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

Pa. Const. art V, §18 provides:

> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. A vacancy on the board shall be filled by the respective appointing authority for the balance of the term. The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board shall act only with the concurrence of a majority of its members.

(c) A member shall not hold office in a political party or political organization. Members, other than judges, shall be compensated for their services as the Supreme Court shall prescribe. All members shall be reimbursed for expenses necessarily incurred in the discharge of their official duties.

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section seventeen of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or

judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

(i) No justice or judge shall participate as a member of the board or of the Supreme Court in any proceeding involving his suspension, removal, discipline or compulsory retirement.

(j) The Supreme Court shall prescribe rules of procedure under this section.

(k) The Supreme Court shall prescribe rules of procedure for the suspension, removal, discipline and compulsory retirement of justices of the peace.

(l) A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section eighteen shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

(m) A justice or judge who shall file for nomination for or election to any public office other than a judicial office shall forfeit automatically his judicial office.

(n) This section is in addition to and not in substitution for the provisions for impeachment for misbehavior in office contained in article six. No justice, judge or justice of the peace against whom impeachment proceedings are pending in the Senate shall exercise any of the duties of his office until he has been acquitted.

42 Pa. C.S. §§1901-1903 provide:

§1901. The Supreme Court shall appoint and may remove a Court Administrator of Pennsylvania.

§1902. A reference in any statute to the Administrative Office of Pennsylvania Courts shall be deemed a reference to the Court Administrator of Pennsylvania who shall, either personally, by deputy, by other duly authorized personnel of the system, or by duly authorized agent, exercise the powers and perform the duties by statute vested in and imposed upon the Administrative Office.

§1903. The Supreme Court may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and district justices.

Pa. R. Crim. P. 65 provides:

(a) If a defendant, sentenced to pay a fine or costs after a finding of guilt in a summary case, defaults in such payments, the issuing authority shall not commit the defendant to prison for failure to pay a fine or costs unless, after hearing, it appears that the defendant is financially able to pay the fine or costs.

(b) When the issuing authority determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the issuing authority may provide for payment of a fine or costs in such installments and over such period of time as he deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden his payments will impose as set forth in paragraph (c) below.

(c) The issuing authority, in determining the amount and method of payment of the fine or costs, shall consider, insofar as it is just and practicable, the burden upon the defendant by reason of his financial means, including his ability to make restitution and reparations.

(d) In cases in which the issuing authority has ordered payment of a fine or costs in installments, the defendant may request a rehearing on his payment schedule when he is in default of a payment or when he advises the issuing authority that such default is imminent. At such hearing, the

burden shall be on the defendant to prove his financial condition has deteriorated to the extent that he is without the means to meet the payment schedule. Thereupon the issuing authority may extend or accelerate the payment schedule or leave it unaltered, as the issuing authority finds to be just and practicable under the circumstances. When there has been a default and the issuing authority finds the defendant is not indigent, he may impose imprisonment, as provided by law, for nonpayment.

(e) Whenever an issuing authority sentences a defendant to pay a fine or the costs or both in a summary proceeding commenced by issuance of a citation, and the defendant is not then physically present, the issuing authority shall issue a warrant for the arrest of the defendant:

(a) when a plea of guilty has been entered, and the amount of fine or costs or both forwarded to the issuing authority does not satisfy the terms of the sentence; or

(b) if an amount posted as security for trial does not satisfy the terms of the sentence.

(f) The warrant shall set forth the amount required to satisfy the fines and costs.

(g) Upon execution of a warrant under this Rule, the police officer shall take the defendant before the

issuing authority named in the warrant who shall proceed as specified in paragraphs (a), (b), and (c) of this Rule.

(h) A police officer, when executing a warrant issued under this Rule may, in lieu of taking the defendant before the issuing authority, accept full satisfaction in the form of a certified check, money order or personal check payable to the issuing authority for the fine and costs imposed which he shall thereupon transmit to the issuing authority named in the warrant.

Pa. R. Crim. P. 316 provides:

(a) In Summary Cases

Counsel shall be assigned in all summary cases to all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed.

(b) In Court Cases

In all court cases counsel shall be assigned prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel.

(c) In all Cases

(i) The court, of its own motion, shall assign counsel

to represent a defendant whenever the interests of justice require it.

(ii) A motion for change of counsel by a defendant to whom counsel has been assigned, shall not be granted except for substantial reasons.

(iii) Where counsel has been assigned, such assignment shall be effective until final judgment, including any proceedings upon direct appeal.

Pa. R. Crim. P. 318 provides:

(a) GENERALLY. The defendant may waive the right to be represented by counsel.

(b) PROCEEDINGS BEFORE AN ISSUING AUTHORITY. When the defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a court case, the issuing authority shall ascertain from the defendant whether this is a knowing, voluntary and intelligent waiver of counsel. In addition, the waiver shall be in writing, signed by the defendant and the issuing authority, be made a part of the record and be in the following form:

WAIVER OF COUNSEL

I, _____, have been
(name of defendant)
told that I have the right to have a lawyer represent me, and the right to have a free lawyer appointed to represent me without cost to me

if I cannot afford to pay a lawyer. I give up these rights and I choose to act as my own lawyer at this hearing/trial.

_____
Defendant

_____
Date

I have determined that the defendant has made a knowing, voluntary and intelligent waiver of his right to counsel.

_____
Issuing Authority

(c) PROCEEDINGS BEFORE A JUDGE. When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary and intelligent waiver of counsel.

(d) STANDBY COUNSEL. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.

Rule 17 of the Rules Governing Standards of Conduct of Justices of the Peace, 450 Pa. xxix (1969), Desk Copy, Pa. Rules of Court 59, 74 (West, 1980) provides:

> The president judge of the court of common pleas of a judicial district shall

exercise general supervision and administrative control over justices of the peace and constables within his judicial district.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

ROBERT P. KANE
ATTORNEY GENERAL

February 24, 1975

COURT ADMINISTRATOR OF PENNSYLVANIA
RECEIVED
FEB 25 1975

Honorable Alexander F. Barbieri
Court Administrator of Pennsylvania
Administrative Office of Pennsylvania Courts
317 Three Penn Center Plaza
Philadelphia, Pennsylvania 19102

Dear Judge Barbieri:

In the past the Department of Justice, when requested to do so, has represented members of the judicial branch of the government of the Commonwealth in litigation to which they have been parties. The basis of this policy has been the Administrative Code, 71 P.S. § 293(b), which requires the Attorney General to "represent the Commonwealth, or any department . . . board, commission or officer thereof, in any litigation to which the Commonwealth or such department, board, commission or officer, may be a party or in which the Commonwealth or such department, board, commission or officer, is permitted or required by law to intervene or interplead." After reconsidering this policy, it is our opinion, and you are so advised, that the judicial branch is not such a department, board or commission of the Commonwealth as is contemplated by the statute and, further, that members of the judiciary are not such officers as are within the statutory language. It is our opinion that any other interpretation of the statute would violate the Constitutional principle of separation of powers and, that, therefore, our prior practice of representing the judicial branch and members thereof in litigation must be discontinued.

Under our Constitution, the powers of the government are divided between three independent co-ordinate branches: the legislature, the executive and the judiciary. The Supreme Court of Pennsylvania has made it clear that the principle of separation of powers was established to maintain and protect the independence of the three branches. In a discussion of the Constitutional provisions referring to the compensation of judges it said:

> "They are independent and co-ordinate, because distinct rights, powers and privileges are

ATTORNEY GENERAL FILE

assigned to them by the Constitution. Each is entitled to the free, unbiased, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows." Commonwealth v. Mann, 5 W & S 403, 407 (1843), Accord, Commonwealth v. Mathues, 210 Pa. 372 (1904).

That Court has also observed that:

"in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will have the least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction of either the strength or of the wealth of the society, and can take no active resolution whatever. It can be truly said to have neither force nor will, but merely judgment, and to be ultimately dependent upon the executive arm for the efficacious exercise even of this facility. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks . . . .

. . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; . . . from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches . . . . The complete

> independence of the judiciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights . . . ." Commonwealth v. Mann, supra at 480-11.

In Mathues, relying in substantial part on the Mann holding, the Supreme Court of Pennsylvania held that members of the judicial branch were not "public officers" within the meaning of the term as used in a Constitutional provision barring an increase in the salary of such officers during their terms of office, concluding that to hold otherwise would violate a specific provision of the Constitution guaranteeing the judges "adequate compensation" and, more importantly, the general Constitutional principle of separation of powers which, according to the Mann decision, that provision was intended to protect. Commonwealth v. Mathues, supra.

It is our opinion that this same Constitutional theory of separation of powers excludes members of the judicial branch from the coverage of 71 P.S. § 293(b) as it is a theory which requires the existence of a certain tension between the separate branches of government which the legal representation of one branch by another tends to eliminate. Such a relationship of dependency by one branch on another creates just that possibility of influence of which the Court spoke in Mann.

In saying this, we do not mean to indicate that this relationship has been or will be improperly used. However, as the Supreme Court noted in Mann, it is not intentional disrespect to either the judicial or executive branches of government to suppose it possible that cases may arise where successful resort may be had to the potential lever of influence in order to accomplish executive goals. See, Commonwealth v. Mann, supra at 409. It is this very potential for conflict and influence which, in itself, violates the Constitutional doctrine of separation of powers and which must, therefore, be eliminated.

In passing we should also note that the Department of Justice and agencies whose legal matters it controls employ over 350 attorneys who are involved in litigation in all the courts of the Commonwealth on a continuing basis; thus, the possibility that the Department might be representing a judge in litigation to which he is a party and at the same time be involved in litigation before him is not insubstantial. This potential conflict of interest, while apparently not explicitly barred by the Canons of Ethics, borders on the improper and may, in itself, justify the termination of any representation of judges by the Department of Justice.

Accordingly, you are hereby advised that the Department of Justice will no longer represent in litigation either individual judges or the judiciary itself. In this regard, we believe, and

you are so advised, that under Article V, Section 10(b) of the Constitution of the Commonwealth of Pennsylvania you, as Court Administrator, have the power to hire an attorney or attorneys to represent the judiciary which would be independent of the control of either the executive or legislative branches of government.

Very truly yours,

Allen C. Warshaw
Deputy Attorney General

Vincent X Yakowicz
Solicitor General

Robert P. Kane
Attorney General

OFFICIAL OPINION NO. 75-9

Court Administrator-- Representation of State Judicial Officers By the Department of Justice - Separation of Powers

1. The Judicial Branch is not a department, board or commission of the Commonwealth within the meaning of Section 903 of the Administrative Code, 71 P.S. § 293.

2. The Constitutional doctrine of separation of powers requires that the total independence of each of the three branches of government be protected and maintained.

3. Representation of state judicial officers by the Department of Justice violates the constitutional doctrine of separation of powers.

4. The Court Administrator of Pennsylvania has authority under Article V, Section 10(b) of the Constitution of the Commonwealth of Pennsylvania to hire attorneys to represent the judiciary.

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 1980, three copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to Timothy P. O'Brien, Esquire, counsel for Respondents, Neighborhood Legal Services Association, 10th Floor, Allegheny Building, 429 Forbes Avenue, Pittsburgh, Pennsylvania 15219. I hereby further certify that all parties required to be served have been served.

/s/ Thomas W. Pomeroy, Jr.
Thomas W. Pomeroy, Jr., Esquire
Kirkpatrick, Lockhart,
Johnson & Hutchison
1500 Oliver Building
Pittsburgh, Penna. 15222

Attorney for Petitioners

October 15, 1980

No. 80-620

DEC 11 1980

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-620

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Respondents respectfully submit that the Petition For Writ Of Certiorari to the United States Court of Appeals for the Third Circuit seeking review of the judgment and opinion entered in this proceeding on July 29, 1980 be denied.

QUESTIONS PRESENTED

I. Should Certiorari issue to review whether judicial immunity bars §1988 award of attorneys fees (incidental to successful §1983 action for equitable relief) when the District Court has not yet fashioned such an award, and where in any event, the defendants subjected themselves to liability for prospective relief under 42 U.S.C. §1983 and, where there is no record below relative to the question which is the predicate to deciding the fees issue, that is, whether judicial immunity bars a §1983 suit for equitable relief.

II. Should Certiorari issue to review whether attorneys fees can be awarded to a non-profit legal services program, which did not charge a fee to the litigant, where such issue has previously been decided in the affirmative by this Court.

III. Should Certiorari issue to review factual question of whether plaintiffs were prevailing parties for purposes of 42 U.S.C. §1983 when such question was decided in the affirmative by the District Court and affirmed by Circuit Court of Appeals, particularly when defendants offered no testimony in rebuttal to plaintiffs counsel's testimony that the lawsuit was a material factor in bringing about a change in defendant's conduct.

IV. Should Certiorari issue to review question of the propriety of fashioning a §1988 attorneys fees award against a state agency which represented the named defendants and actively participated in all phases of the litigation, when similar issue was recently decided in the affirmative by this Court in Hutto v. Finney.

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SUMMARY OF ARGUMENT

I. Certiorari should not issue to decide question of whether judicial immunity bars §1988 award of attorneys fees

A. Certiorari should not issue to decide question which is not ripe for review. The Circuit Court's remand left open question of against whom the award of attorneys fees should be fashioned; and the District Court has not fashioned such an award against the defendants. Therefore, the question of whether an award of attorneys fees is barred by judicial immunity is not ripe for review.

B. In order to decide if judicial immunity bars an award of fees in the present case, the Court must first decide whether such immunity bars §1983 suits for equitable relief. This issue, however, was not raised below or addressed by the District Court or Circuit Court of Appeals; it may also be moot. The Court therefore should not issue certiorari, since the predicate to deciding the fees issues it not properly before it.

C. Attorneys fees are integral to a successful action for §1983 equitable relief. The defendants waived any immunity defenses they may have had from such relief. Plaintiffs, therefore, as prevailing parties in a §1983 action for equitable relief, to which no immunity defenses were raised, are entitled to an award of attorneys fees. Certiorari should not be granted, therefore, since this case does not squarely present issue of whether judicial immunity bars §1988 attorneys fees awards.

D. §1988 attorneys fees awards are not the equivalent of damages, and, therefore judicial immunity does not apply. In Consumers Union, the Court rejected the notion that fees and damages were equivalent by holding that fees could be assessed against the Virginia Supreme Court in its enforcement capacity for which it enjoyed absolute immunity from damages. Similarly, since the same reasons underlie prospecutorial immunity as support judicial immunity, the Court implicitly re-

jected the argument that an award of attorneys fees (incidental to prospective relief) interferes with judicial or prosecutorial independence. Moreover, the Congressional history completely supports the conclusion that attorneys fees, incidental to a successful action for equitable relief, should be awarded in circumstances where immunity would bar an action for damages.

II. Certiorari should not issue to review question whether attorneys fees can be awarded to non-profit legal services

A public interest, nonprofit law firm is entitled to an award of attorneys fees incidental to a successful §1983 action for equitable relief.

In Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980), the Court relying on the legislative history to §1988 held that a public interest law firm, which did not charge a fee to a litigant, was entitled to an award of attorneys fees under §706K of the Civil Rights Act. Therefore, since the Court

has recently decided the issue, no reasons exist for the Court to review the question in this case.

III. Certiorari should not issue to review question of whether Plaintiffs were prevailing party

Certiorari should not issue to review question of whether plaintiffs were prevailing parties since it is a factual question which has been decided in the affirmative by the District Court and Circuit Court of Appeals. Particularly, since, defendants did not offer any testimony in rebuttal to plaintiffs' counsel's testimony that the lawsuit was a material factor in eliminating defendants' illegal conduct.

IV. Certiorari should not issue to review question of whether fees can be awarded against state agency

The defendants were represented by the local and state court Administrator's Office. The Circuit Court specifically noted that these agencies actively participated in all phases

of the proceedings. Under such circumstances, there is no merit to the contention that an award of attorneys fees against such agencies would violate due process. Moreover, the legislative history to §1988 explicitly recognized that fees would be awarded against the state or its agencies. Finally, the present case is controlled by the Court's decision in Hutto v. Finney, which specifically upheld such awards against the state.

STATEMENT OF THE CASE

This case principally involves the issue of whether plaintiff's counsel was entitled to attorneys fees pursuant to the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. §1988 (Supp. 1980) "§1988". The following discussion deals with both the underlying proceedings as well as the subsequent proceedings involving counsel fees. Plaintiff's counsel through all proceedings below was the Neighborhood Legal Services Association, Inc., a non-profit corporation funded by public and private grants.

A. Underlying Proceedings (§1983)

In March, 1978, Patricia Morrison and other named plaintiffs filed a class action against John J. Ayoob and certain other district justices from Beaver County, Pennsylvania, seeking to enjoin and declare

unlawful defendants' common practice of allegedly jailing indigent persons for petty and/or summary offenses without first affording them a right to obtain counsel.[1/] This conduct was alleged to violate plaintiffs' rights under 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. See, Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972). A claim that the challenged conduct violated state law was also advanced. (4a)

Both the claim and the relief sought were narrowly defined. In their complaint and amended complaint the plaintiffs sought only equitable and declaratory relief. The

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1/ District Justices were formerly known as district magistrates or justices of the peace. District justices are, with limited exceptions, elected judicial officers and their jurisdiction is limited by statute to minor civil and petty and/or summary criminal matters. See, Act of July 26, 1976 P.L. 586, No. 142, §2, eff. June 26, 1978. As amended by the Act of April 28, 1978, P.L. 202, No. 53, §10, eff. June 28, 1978, 42 Pa.C.S. §1515, which outlines the jurisdiction of district justices.

district justices were sued solely in their official capacities.

By a memorandum and order dated May 31, 1978, the lower court denied a motion to dismiss the complaint which was filed by Jonathan Vipond, III, Esquire, a staff attorney for the Administrative Office of the Pennsylvania Courts (hereafter Administrative Office). (21a)[2/]

Following the district court's May 31, 1978 order, the defendants filed an answer (24a) and the plaintiffs began to engage in discovery.

On August 4, 1978, the plaintiffs moved the lower court for a preliminary in-

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2/ The sole ground advanced by the Administrative Office for dismissing this action was a claim that the district court was required to abstain. No other defenses were asserted. (13a; 17a) [Bracketed citations throughout Statement of the Case refers to pages in the appendix filed in the Court of Appeals.]

junction. (36a) However, no hearing on this motion was ever held because the parties, under the district court's guidance, engaged in a series of negotiations designed to resolve the merits of the litigation.

Finally, as Judge Knox found,

> "the case progressed to the point where the Administrative Office of the Court in Beaver County and the President Judge thereof admonished the district justices that they had to comply with the requirements of the Pennsylvania Supreme Court and the requirements of Argersinger and the practice thereupon ceased ..." (emphasis added) (125a)

It appearing to the district court that the action of the various court officials had removed any need for further proceedings it, with the concurrence of the plaintiffs, granted defendants' motion to dismiss the case as moot. (63a-72a)

This order specifically noted that the plaintiffs did not intend to waive their right to seek counsel fees as a prevailing party pursuant to the Fees Act. (72a)

B. Counsel Fee Proceedings

On December 11, 1978, plaintiffs' counsel filed a motion for attorneys fees. (73a) Attached to the petition were detailed accounts describing the activities and hours for which fees and other costs were being sought. (75a-78a)

No fees were sought against the district justices in their individual capacities. Instead, fees and other costs were sought against the Administrative Office which supervises the defendants and which had also defended the district justices throughout the underlying proceedings.[3/]

3/ Various counsel entered appearances on behalf of the defendants in this matter. However, each counsel was attached to a court administrative office or was acting purely as local counsel. Robert J. Taylor, Esquire was from the Administrative Office of Beaver County Courts. Jonathan Vipond, III, Esquire was from the Administrative Office. David Brakoniecki, Esquire entered his appearance as local counsel for Mr. Vipond. (See Docket Entries). It was Mr. Vipond who assumed primary responsibility for defending the conduct of the district justices and for contesting the fee petition filed by the plaintiffs' counsel.

(footnote continued)

On January 30, 1979, the lower court held a hearing on plaintiffs' fee petition. Thereafter (the Administrative Office having raised the issue of immunity for the first time) the trial court directed briefs to be submitted on the issue of whether the doctrine of judicial immunity barred an award of fees and costs against the agency which supervised the district justices and had also defended their challenged activities.

On March 27, 1979, having previously indicated that plaintiffs' counsel had shown a prima facie case for fees (94a), the trial court held a further hearing on the fee petition. At this hearing evidence was presented only on the issue of whether the plaintiffs were prevailing parties under the Fees Act. During the hearing the parties

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3/ (footnote continued)

This was done in his capacity as a staff attorney for the Administrative Office. (See Comments of district court, 21a)

stipulated that: (1) $4,578.45 represented a fair and reasonable figure for costs and counsel fees if such were ultimately awarded by the district court (117a-118a; 12a)[4/] and, that plaintiffs would waive costs and fees for any additional collateral matters which might develop in the lower court but were reserving the right to seek additional fees and costs in the event either party filed an appeal from an order dealing with the December 11, 1978 petition for fees and costs.[5/]

4/ Plaintiffs' counsel claimed general costs of $158.45 and specifically claimed reimbursement for 110.5 hours of professional time at a rate of $40.00 per hour. (75a-78a)

5/ There existed the possibility of a brief collateral proceeding in the lower court resulting from a petition to vacate the lower court's dismissal order of October 20, 1978, which was presented by the plaintiffs after the fees petition had been filed and which alleged that defendant John J. Ayoob continued to engage in the challenged conduct despite assurances that such conduct had ceased (80a). Although at the March 27, 1979 hearing it appeared to all concerned that a consent order would be shortly entered which would resolve the petition to vacate (123a), events were such

(footnote continued)

By an order dated May 24, 1979, the Honorable William W. Knox denied plaintiffs' counsel's request for attorneys fees (125a). Although Judge Knox concluded that the plaintiffs were the prevailing party he concluded that he would not exercise the court's discretion to award fees.

A timely appeal was taken to the Court of Appeals for the Third Circuit. Jurisdiction of the appeal existed pursuant to 28 U.S.C. §1291 (1976). On July 29, 1980, that Court reversed the decision of the district court, ruling that "judicial immunity is not a factor to be considered under §1988".

5/ (footnote continued)

that the parties were unable to secure a formal signing of a consent agreement until June 25, 1979 (130a). Thereafter, a petition filed jointly by the parties to this proceeding was lodged with the Court requesting remission of the record to enable the lower court to formally enter the consent agreement as an order.

Slip Opin. at 8. The court also rejected the defendants' alternative positions in support of the district court's order denying the application for fees. The case was remanded to the district court for a determination of who should be directed to pay the award of fees, and for the entry of a proper decree. The district court was authorized, if it saw fit, to give further consideration to the reasonableness of the amount of the fees claimed, notwithstanding that this had not been an issue in the trial court. A stay of the Circuit Court's mandate was obtained to allow the filing of the Petition for Certiorari.

ARGUMENT

I. REASONS FOR DENYING THE WRIT

A. The Issue of Judicial Immunity is not ripe for Consideration by the Court since the Circuit Court remand did not specify against whom the Award was to be made

The Circuit Court remanded the cause to the district court to an enter an award of attorneys fees consistent with its opinion. The Court left open the issue of whom the award of attorneys fees could be assessed, noting that, arguably, either the local or state court Administrator's Office could be responsible for the award. The exact nature of the award of attorneys fees, however, has not yet been fashioned, therefore, it is premature to address the question of whether judicial immunity bars an award of attorneys fees in this case. The Court should not grant certiorari to address issues that are not ripe for review. Enginemen v. Bangor & A.R. Co., 389 U.S. 327 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251, 257-258 (1916).

B. The Court should not grant Certiorari where an essential issue necessary to determine the cause was not raised below nor addressed by either the District Court or Circuit Court of Appeals

The Court is asked to grant certiorari on the question of whether the doctrine of judicial immunity bars an award of attorneys fees under 42 U.S.C. §1988.[6/] The record in this case is devoid of those factors, both legal and factual which would support such an exercise of this Court's discretion; the petition should, therefore, be denied.[7/]

6/ The Civil Rights Attorneys' Fees Awards Act of 1976 amended 42 U.S.C. §1988 to provide in relevant part: "In any action or proceeding to enforce a provision of section...1983...of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs."

7/ Since the defense of judicial immunity from §1983 injunctive relief was not raised the Court is without the factual or legal development on such issues as whether the district justices failure to comply with Argersinger v. Hamlin, 407 U.S. 25(1972) and Pa.R.Crim.P., 65, 318, were ministerial acts for which judicial immunity would not apply.

The propriety of a fees award under §1988 in the face of a judicial immunity claim cannot be determined except by an assessment of that claim with respect to the underlying action under 42 U.S.C. §1983. In Supreme Court of Virginia v. Consumers Union, ___U.S.___, 100 S.Ct. 1967 (1980) this Court decided that an award of attorneys fees is appropriate in those cases in which prospective relief could properly be awarded against the defendant.8/

In citing the legislative history, the Court stated:

> "The House Committee report on the Act indicates that Congress intended to permit an award of attorneys'

8/ The Court in Consumers Union found that an award of prospective relief against state officials acting in their legislative capacity was barred by the doctrine of legislative immunity, hence, an award of fees would also be improper. Id. at 1975.

> fees in cases in which prospective relief was properly awarded against the defendants who would be immune from damage awards. H.R.Rep. No. 94-1558, 94 Cong.2d Sess. 9, 1976...." Id. at 1978

Therefore, in the present action, to determine if an award of attorneys fees can be granted pursuant to "§1988" the Court must first decide if Congress abrogated judicial immunity from suits brought under 42 U.S.C. §1983.

In the present case, however, the district justices never objected to the §1983 claim for prospective relief.[9/] The issue was never addressed by either the District

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9/ The District Justices, represented by a staff attorney for the Pennsylvania Court Administrator's Office filed a 12(b) motion to dismiss solely on the abstention doctrine (Younger v. Harris, 401 U.S 37 (1971)). Their answer, filed by the local court administrator's office, likewise made no reference to a judicial immunity defense. Indeed the justices did not even raise the §1983 immunity issue as a defense to the attorneys' fees claim at issue here.

Court or the Circuit Court of Appeals.[10/] Therefore, the Court must decide an issue which is not properly before it. Under such circumstances the Court should not grant certiorari.

It is well established that the Court will not ordinarily consider issues neither

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10/ Indeed, in its brief to the Circuit Court of Appeals, the District Justices made it clear that they did not oppose an award of declaratory and injunctive relief sought pursuant to 42 U.S.C. §1983.

> "There is no need...for the Court to decide whether judicial immunity applies to awards of injunctive or declaratory relief. Compare Mirin v. Justices of the Supreme Court of Nevada, 415 F.Supp. 1178 (D.Nev.1978), with United States v. McCleod, 385 F.2d 234 (8th Cir. 1967). The rationale underlying judicial immunity arguably would not be defeated by permitting injunctive and declaratory remedies against judges, because the prospect of such decision-oriented remedies would not influence a judge's decision any more than would the prospect of an appellate reversal. Cf. Wood v. Strickland, 420 U.S. 208 (1975).

raised before nor considered by the courts below. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n.2 (1970). As explained in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163, 164 (1975) where the court refused to consider an issue not raised in the District Court:

> "Thus, not only are we unenlightened on the question...as factual matter...but we are without a lower court opinion on the legal issue, under such circumstances, we normally decline to consider a legal claim." Ramsey v. Mineworkers, 401 U.S. 302, 91 S.Ct. 1598 (1971); Adickes v. S.H. Kress & Co. ..." (See infra. fn. 7)

See also, Duignan v. United States, 274 U.S. 195, 200 (1927); Singleton v. Wulff, 428 U.S. 106, 121 (1976); Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 394, 397, 398 (1971).

The Court, therefore, should decline to grant certiorari on the issue of whether an award of attorneys' fees sought pursuant to 42 U.S.C. §1988 is barred by the doctrine of judicial immunity since the predicate to deciding that question, i.e., whether pro-

spective relief under 42 U.S.C. §1983 could be granted against defendants, was not properly preserved by the District Justices for this Court's review.

Moreover, the District Justices admit in their petition (P.38, fn.13) that this case does not properly present the issue of whether judicial immunity bars §1983 suits for prospective relief. They also assert that the issue of prospective relief is moot. (P.27, fn.8). The Court should not exercise its discretion to review a case in which an essential issue is not properly before it, and which may be moot; the petition therefore, should be denied. Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

C. The Court should not grant Certiorari to decide the issue of whether judicial immunity bars an award of attorneys'fees since the case can be decided on other grounds without reaching that question

The award of attorneys'fees under 42 U.S.C. §1988 is premised upon the appropriateness of the underlying action for prospective relief sought pursuant to 42 U.S.C. §1983. As asserted infra. at pp. 11-16, that issue is not properly before the Court since it was neither raised below or addressed by the District Court or Circuit Court of Appeals. Assuming arguendo, however, that judicial immunity was a bar to an action for equitable relief under 42 U.S.C. §1983, the plaintiffs would nonetheless be entitled to an award of attorneys fees in the present action.[11/]

11/ Plaintiffs submit that in enacting 42 U.S.C. §1983 Congress intended to abrogate the doctrine of judicial immunity from suits brought under 42 USC §1983. Mitchum v. Foster, 407 U.S. 225 (1972). Accordingly, plaintiffs would be entitled to an award of attorneys' fees under the Court holding in Consumers Union, supra., at 1978.

Such an award is proper based upon defendants waiver of any immunity defenses which they might have had from liability for prospective relief under 42 U.S.C. §1983. This case, therefore, does not squarely present the issue of whether the doctrine of judicial immunity bars an award of attorneys fees since the Court need not reach the question in order to dispose of the case.

The defense of judicial immunity was first raised in opposition to plaintiffs' motion for an award of attorneys fees. It was never raised, however, against the underlying action for declaratory and injunctive relief.[12/]

12/ The doctrine of judicial immunity, like other affirmative defenses, must be pleaded and proved by the party asserting the defense. Rule 8(a) FRCP (Defendant must plead any "matter constituting an avoidance or affirmative defense"). Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980), (defendant must plead affirmative defense of qualified immunity); Green v. James, 473 F.2d 660 (9th Cir. 1973)(defendant must plead affirmative defense of absolute immunity). See also Wright & A. Miller,

(footnote continued)

(See fn. 3, infra.) The District Justices in fact agreed that judicial immunity did not bar an award of declaratory and injunctive relief. (See fn. 2, infra.)

The District Justices having failed to object to the underlying §1983 action for declaratory and injunctive relief, cannot now object to an award of attorneys fees; since such an award flows from and is integral to that action. The legislative history is clear:

> "In several hearings...the Committee has found fee awards are essential if the Federal statutes to which S.2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillarly and incident to securing compliance with these laws,

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12/ (footnote continued)

Federal Practice and Procedure: §1271 (1969). A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. Wagner v. Fawcett Publications, 307 F.2d 409 (7th Cir. 1962) cert. denied, 372 U.S. 909 (1963); Golden Oil v. Exxon Co., U.S.A., 543 F.2d 548 (5th Cir. 1976).

> and that fee awards <u>are an integral part of the remedies</u> necessary to obtain such compliance." (Emphasis added) LEG. HIST. 5 (Senate Report)

Similarly, in <u>Consumers Union</u>, supra, at 1978, the Court cited the House Committee report evidencing Congress' intent to permit fee awards in cases in which prospective relief was awarded against defendants. Moreover, it is unnecessary to obtain a final judgment against the defendant to be entitled to an award of fees under 42 U.S.C. §1988. It is sufficient if the litigant succeeds in the case by such means as a consent decree or by the defendants' voluntary cessation of the illegal conduct. LEG. HIST. 7 (House Report).

In the present action both the District Court and the Circuit Court of Appeals found that plaintiffs were prevailing parties. As stated by the Circuit Court:

> "This sequence of events strongly suggests that the action was a material factor in bringing about the defendant's change in conduct." Slip Opinion 5

The plaintiffs as the successful party in a §1983 action for equitable relief in which the defendants did not assert immunity from such relief, are entitled to an award of attorneys fees. The issue of whether the doctrine of judicial immunity bars an award of attorneys fees is,consequently,not squarely presented in this case. The Court, therefore, should refuse to grant certiorari and the petition should be denied. Alma Motor Co. v. Tinkin-Detroit Axle Co., 329 U.S. 120 (1946); Barr v. Mateo, 355 U.S. 171 (1957).

D. Certiorari should not be granted since District Justices have failed to assert any compelling reasons why doctrine of judicial immunity should bar an award of attorneys fees under 42 USC §1988

1. Fees are not the equivalent of damages

The District Justices assert that the doctrine of judicial immunity which bars an award of damages against judges acting in their judicial capacity likewise bars an award of attorneys fees against judges so acting,

claiming that such fees are the functional equivalent of damages.

This reasoning, if accepted, would prevent the award of attorneys fees in any case where the defendant can claim immunity from damages. If fees are equivalent to damages as against judges, then fees must also be equivalent to damages as against other officials asserting immunity.

In Consumers Union, the Court held that prosecutorial immunity from damages did not bar an award of attorneys fees against the Virginia Supreme Court acting in its enforcement capacity. Thus, the argument that attorneys' fees are equivalent to damages is directly contrary to the decision in Consumers Union.

Therefore, a writ of certiorari should not issue based on the argument that fees are equivalent to damages.

2. Attorneys' Fees do not Interfere with Judicial Independence

The doctrine of judicial immunity is based on the belief that judicial officers

will not perform their responsibilities independently if they are subject to personal liability in a suit for damages. Bradley v. Fisher, 13 Wall 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967). The Petitioners' argument that an award of attorneys' fees will have a chilling effect upon judicial conduct is based on a similar premise. The Court in Consumers Union, however, implicitly rejected such a notion.

The freedom to act independently and without fear of personal liability underlies the absolute immunity from damages enjoyed by both judges and prosecutors. Imbler v. Pachtman, 424 U.S. 409, 423 (1976).[13/] If personal liability results from an award of attorneys' fees; then, such an award could not have been assessed agaist the Virginia Supreme Court acting in

13/ Indeed this Court has stated that the judgment of prosecutors and judges is functionally equivalent: "It is the functional comparability of their judgments to judges that has resulted in ... prosecutors being referred to as quasi-judicial officers..." Id. at 423, fn. 20.

its prosecutorial capacity. The Court, however, decided to the contrary; and, therefore, rejected any argument that an award of attorneys' fees imposes personal liability on the official in question. If no personal liability is imposed, the doctrine of judicial immunity does not apply.[14/] Further, Congress' intent that state officials would not be personally liable for an award of attorneys' fees is clear from the Senate Report which accompanied S.2278.[15/]

> "In such cases it is intended that attorneys' fees like other items of costs, will be collected either from

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14/ The courts conclusion that legislative immunity barred §1983 suits for equitable relief does not support a similar conclusion as to judicial immunity since common law legislative immunity is unique in that it is similar in origin and rationale to that accorded Congressman under the Speech or Debate clause. That judicial immunity from §1983 suits for equitable relief can be treated differently from legislative immunity from such suits is evident from the decisions of the Second Circuit, compare, Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2nd Cir 1980) barrring §1983 injunctive suits against legislators, and Heimbach v. Village of Lyons, 597 F.2d 344 (Ca.2, 1979) holding that judicial immunity does not extend to such suits.

15/ S.2278 was the Senate substitute for H.R.

(footnote continued)

> the official in his official capacity from funds of his agency or under his control, or from the state or local government. (Whether or not the agency of local government is a named party) (footnote omitted) LEG. HIST.11 (Senate Report)." Cited with approval in Hutto v. Finney, 437 U.S. 678 (1978)

In the typical case, a named individual's office of government acts as a surety for any costs that might be awarded to a prevailing plaintiff.[16/] In the instant case, no fees were sought directly from the pockets of the defendants. Instead fees were sought only from the State agency (administrative offices of

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15/ (footnote continued)

15460 and with one minor amendment became Pub.L. 94-559. The history of both S.2278 and H.R. 15460 are to be read together as the joint history of Fees Act. See Remarks of Rep. Drinan, LEG. HIST. 254 (112 Cong.Rec.H. 12159, daily ed. 10/1/76).

16/ The "surety" role of state and local governments was certainly something Congress was very aware of. Some of the best evidence of this intention came from the Act's opponents. See Remarks of Sen. Helms who in seeking to amend the Act to make governments immune advised his colleagues that, "it was unwise to provide that liability in these amounts (for fees) be assumed by...governments" (Emphasis added) LEG. HIST. 78-79 (122 Cong.Rec. S.16432, daily ed. 9/22/76).

the Pennsylvania Courts) which represented the defendants in the underlying proceedings.

The potential for personal consequences, never entered the picture during the fees proceedings. Therefore, the claim that an award of attorneys' fees may have a chilling effect on judicial conduct is unwarranted and provides no basis for applying the doctrine of judicial immunity to an award of attorneys fees. Moreover, the failure to claim judicial immunity from the §1983 suit for equitable relief very strongly suggests that such actions do not interfere with the functioning of the District Justices. (See fn. 10, infra.)

3. Legislative History

The District Justices next assert that the legislative history relied upon by the Circuit Court does not support the conclusion that Congress intended to abrogate judicial immunity as a defense to an award of attorneys' fees pursuant to §1988. It is claimed that the footnote to Pierson v. Ray, in H.R.

94-1558[17/] is ambiguous since that case dealt with special defenses as well as judicial immunity, and therefore, cannot be relied upon for proposition that Congress intended to abrogate the doctrine of judicial immunity as a defense to an award of attorneys fees. (See Pet., pp. 35-43). Even though Pierson dealt with both judicial and official immunity concepts, it was, as of October, 1976, the only Supreme Court decision holding judges immune from 42 U.S.C. §1983 damages claim. Moreover, the only reason to include Pierson as a citation would have been

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17/ "Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460 it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [Wood v. Strickland; Scheuer v. Rhodes; Pierson v. Ray]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if federal civil and constitutional rights are to be adequately protected. To be sure in a large number of cases brought under the provisions covered by H.R.15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." LEG.HIST. 9 (House Report) (emphasis added)

as authority for immunity doctrines which "preclude the damage remedy." Neither Wood v. Strickland, nor Scheuer v. Rhodes (the other cases cited in the footnote) are appropriate authority for absolute immunity--instead, these cases are authority for "special defenses" which "limit the damage remedy." (See LEG.HIST. 9, House Report) Therefore, it is obvious that Pierson v. Ray, was cited in the legislative history to demonstrate Congress' intent to allow an award of attorneys' fees pursuant to §1988 against officials who have judicial immunity from damages.

4. Congress has the Authority to Abrogate Judicial Immunity from an Award of Attorneys Fees sought Pursuant to 42 U.S.C. §1988

The District Justices argue that Congress cannot abrogate judicial immunity enjoyed by state judges because of the principles of separation of powers embodied in the "guarantee clause" of Article IV, Section 4 of the United States Constitution.

Even if judicial immunity has a constitutional basis, which it does not[18] Congress could abrogate that immunity under the Fourteenth Amendment.

The Fourteenth Amendment expressly empowers Congress to enforce its provisions against the State. Monroe v. Pape, 365 U.S. 167 (1961). The Court has consistently held that Section 5 of the Fourteenth Amendment enables Congress to abrogate state government immunities when necessary to ensure its enforcement. See Fitzpatrick v. Bitzer, 427 U.S. 678 (1976) and Hutto v. Finney, supra. (Congress has the power under Section 5 to abolish sovereign immunities enjoyed by the states under the Eleventh Amendment).

18/ The Petitioner's assertion that judicial immunity is inherent to a republican form of government is incorrect. The authority of a republication form of government guaranteed under Article 4, Section 4, are determined by Congress and elected representatives of the people. The petitioner's claim that Article 4, Section 4 guaranteed state judges immunity from suits for prospective relief raises a non-justiciable question. Baker v. Carr, 369 U.S. 186, 218, 225 (1962). Moreover, in the case cited by Petitioner, Bauers v. Heisel, 361 F.2d 581, 588-589 (3d. Cir. 1966) the Court admitted that the "guarantee of a republican form of government" clause was non-justiciable.

In New York Gaslight Club, Inc. v. Carey, ___ U.S. ___, 100 S.Ct. 2024 (1980), the Court rejected a Tenth Amendment argument that an award of attorneys fees under §706K of the Civil Rights Act of 1964 infringes upon the states power.

> "We must reject petitioners Tenth Amendment argument. Congress' power under §5 of the Fourteenth Amendment is broad, and overrides any interest the State might have in not authorizing awards for fees in connection with state proceedings. See Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565; Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666" Id/ at 2032 (emphasis added)

The decision in New York Gaslight Club, Inc., applies to fees sought under §1988.[19/] Congress therefore can clearly abrogate judicial immunities to allow for an award of attorneys' fees under §1988.

19/ Civil Rights Attorneys Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. §1988 ... is legislation similar in purpose at and designed to Title VII's fee provision. See. H.R. Rep. No. 94-1558, pgs. 5 and 8, n.16 (1976). Id. at 20374, n.9.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF WHETHER AN AWARD OF ATTORNEYS FEES IS APPROPRIATE IN CIRCUMSTANCES WHERE THE LITIGANT DOES NOT ACTUALLY INCUR ANY FEE SINCE THE COURT ONLY LAST TERM DECIDED THAT ISSUE IN THE AFFIRMATIVE

The District Justices assert that there exists no justification for an award of attorneys fees in circumstances where the litigant has not actually incurred any legal fees. The Court is asked to address this issue because defendants contend that Rodriquez v. Taylor, 569 F.2d 1231 (3rd. Cir. 1977) cert. denied, 436 U.S. 913 (1978), was improperly relied upon by the Circuit Court in awarding attorneys fees to the plaintiffs.[20/] The Court, however, has recently addressed this question, and therefore, it is not necessary to grant certiorari to decide that issue in the instant controversy.

20/ In Rodriquez attorneys fees were awarded to a public interest law firm under the Fair Labor Standards Act. Petitioner contends that Rodriquez, does not provide authority for an award of attorneys fees to a public interest law firm under §1988 because such an award is discretionary while under the Fair Labor Standards Act an award of attorneys fees is mandatory.

In New York Gaslight Club, Inc., supra, at 2034, n.9, the Supreme Court expressly rejected any contention that an award of attorneys' fees was inappropriate because the litigant was represented by a public interest law firm:

> "We also reject petitioners argument...that respondents representation by a public interest group is a special 'circumstance' that should result in a denial of counsel fees. Federal Court of Appeals' decisions are to the contrary. See e.g., Reynolds v. Cooney, 567 F.2d 1166; Torres v. Sacks, 538 F.2d 10, 13 (Ca.2, 1976), Congress endorsed such decisions allowing fees to public interest groups when it was considering and passed, the Civil Rights Attorneys' Fees Award Act of 1976, 90 Stat. 2641 42 U.S.C. §1988, which is legislation similar in purpose and design to Title VII's fee provision. See H.R. Rep. No. 94-1558, pp. 5 and 8, n.16 (1976)."

In Torres v. Sacks cited above with approval, the Fourth Circuit Court of Appeals set forth the reason for allowing attorneys fees even though the attorney did not exact a fee:

> "Application of the provision to furnish full recompense for the value of services in successful litigation helps assure the continued availability of the services

to those most in need of assistance..." Id. at 13-14

See also cases cited in Torres, Jordan v. Fusari, 496 F.2d 646, 649 (2d Cir. 1974), and, Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974). The language in Brandenburger is particularly persausive:

> "Thus, an award of attorneys fees to the organization providing free legal services indirectly serves the same purpose of an award directly to a fee paying litigant. See Note, Awards of Attorneys Fees to Legal Aid Offices, 87 Harv.L.Rev. 411 (1973). Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." Miller v. Amusement Enterprise, Inc., supra, 426 F.2d at 539.

Since the issue has been decided the Court should not review it again in the context of this case.21/

21/ Petitioners assertion at Pet. 49, that an award of attorneys fees would result in a smaller budgetary allocation from the Commonwealth of Pennsylvania to Neighborhood Legal Services next year is without any basis in the record. To the contrary an award of attorneys fees has never resulted in a smaller budgetary allocation to Neighborhood Legal Services.

III. THE COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI ON THE ISSUE OF WHETHER PLAINTIFFS WERE PREVAILING PARTIES SINCE IT IS A FACTUAL QUESTION WHICH WAS RESOLVED AFFIRMATIVELY BY THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

The Court should not grant certiorari on the issue of whether respondents were prevailing parties. Issues of fact are not generally reviewable, particularly if the District Court's findings received the concurrence of the Court of Appeals. Branti v. Finkel, ____ U.S. ____, 100 S.Ct. 1287 (1980); The Court has often held that:

> "A court of law, such as this Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271 275 (1949); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967)

No exceptional show of error exists in this case. The District Justices did not offer any rebuttal to the testimony of John Dineen, lead counsel for the plaintiffs, that the

lawsuit was a material factor in bringing about a cessation of the complained of conduct. Consequently, there is no basis for disturbing the lower court's finding. Therefore, the Court should refuse to grant certiorari since the issue is primarily factual and raises no important questions which should be addressed by this Court.

IV. THE COURT SHOULD DECLINE TO ISSUE A WRIT OF CERTIORARI TO DETERMINE THE APPROPRIATENESS OF ASSESSING ATTORNEYS FEES AGAINST THE GOVERNMENT SINCE THAT ISSUE WAS RECENTLY DECIDED BY THE COURT IN HUTTO v. FINNEY

The issue of whether attorneys fees can be assessed against the government was conclusively decided by this Court in Hutto v. Finney, 437 U.S. 678 (1978). No basis exists for the Court to review that question again in the context of the instant case. As acknowledged by the District Court, the State Court Administrator's Office had fully assumed responsibility for the defense of the District Justices. Similarly the Court of Appeals found:

"Both [the County and the State

> Court Administrator] entered appearance in the District Court and actively participated in all phases of the case."
> Slip Opinion 8

Under such circumstances the assertion that an award of fees against the government in this case violates due process is totally without merit. Further, the issue is not ripe for consideration by this Court, since no award has yet been entered against the County or State Court's Administrator's Office. The Court, therefore, should decline to grant certiorari on the issue of whether an award of attorneys' fees can be assessed against the government.

CONCLUSION

For the reasons set forth above, the Respondents respectfully submit that a Writ of Certiorari should not issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

Timothy P. O'Brien

TIMOTHY P. O'BRIEN, ESQUIRE

CERTIFICATE OF SERVICE

I, TIMOTHY P. O'BRIEN, hereby certify that on December 10, 1980, three copies of Respondents' Brief in Opposition were mailed, postage prepaid, to Thomas W. Pomeroy, Jr., Esquire, Counsel for Petitioners, at Kirkpatrick, Lockhart, Johnson & Hutchison, 1500 Oliver Building, Pittsburgh, Pennsylvania, 15222. I hereby further certify that all parties required to be served have been served.

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No. 80-620

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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This Reply Brief is filed pursuant to Rule 22.1.5 of this Court, in order to address certain arguments first raised in Respondents' Brief in Opposition. The non-mention of certain other arguments of respondents does not, of course, indicate our agreement with them.

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ARGUMENT

I.

The Principal Issue is Whether Petitioners are Entitled to the Defense of Judicial Immunity.

Seemingly in an effort to blunt the issue of immunity of the district justices from awards of attorneys' fees, the respondents have sought in the appellate stages of this case to involve the Administrator of the Pennsylvania Courts and his office as an active participant in, if not a party to, this case. The effort may also be directed to supporting the mistaken recital of the Court of Appeals (See Morrison v. Ayoob, 627 F.2d 669, 673, Appendix to the Petition for Certiorari at 8b) that the Administrator (and also the county court administrator) entered an appearance in the district court "and actively participated in all phases of the case," and hence could legally be charged with attorney's fees. This inaccuracy of the Court of Appeals, and the faulty conclusion

drawn therefrom, is treated in part IV of the Petition for Certiorari at 57 et seq., and especially at 60-61, and will not be here repeated.[1] In short, the present

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[1] Respondents feel compelled to reply to some of the misstatements of fact contained in the Brief in Opposition:

1. On page 3, first paragraph, it is stated that the motion to dismiss the § 1983 action below was filed by Jonathan Vipond, III, "a staff attorney for the Administrative Office of the Pennsylvania Courts." The motion to dismiss therein referred to was in fact filed on behalf of the defendant district justices by their lawyer, who was Mr. Vipond, whose appearance had been entered on behalf of the district justices. Mr. Vipond did not appear for the Administrative Office of the Pennsylvania Courts; neither that office nor the Administrator himself, Judge Alexander F. Barbieri, was a party to or entered an appearance in the proceeding.

2. Footnote 2 on page 3 of the Brief in Opposition is in error in stating that the "Administrative Office" advanced any ground for action or took any position in the trial court; the Administrative Office did not take part in the proceeding.

3. On page 5, second paragraph, it is stated that respondents sought attorney fees and other costs "against the Administrative Office which supervises the defendants [petitioners here] and which had also defended the district justices throughout the underlying proceedings." Our response to this misstatement is twofold:

a. First, there is no evidence and it is not true that the Administrative Office supervises

(FOOTNOTE 1 CONTINUED)

FOOTNOTE 1 CONTINUED

the defendant district justices. Neither is it true that said office had defended the justices in the § 1983 proceedings. The defendant justices were represented by two lawyers who entered appearances for the several defendants; that the lawyers were employed by the state and county administrative offices, respectively, did not mean that those offices were in the case in any fashion.

b. Second, it is not true that fees were sought by respondents against the Administrative Office. As stated in the Petition for Certiorari at 18, the motion for fees and costs pursuant to § 1988 contained no indication of the party or parties from whom the fees were sought.

4. Footnote 3 on page 5 of Respondents' Brief in Opposition states that Mr. Vipond in his capacity as staff attorney for the Administrative Office of the State Courts "assumed primary responsibility for defending the conduct of the district justices." Again, two observations are to be made in response to this erroneous assertion:

a. The quoted statement is misleading and untrue; what had been the conduct of the defendants was never ascertained, for the § 1983 case was never tried. The district judge's suggestion at 21a, referred to by Respondents in support of their quoted statement, was mistaken, as the record will show. Mr. Vipond corrected the court's misapprehension at first opportunity, stating, "we are not here to defend any improper practices, unconstitutional or on a lesser level. . . ." [67a]

b. Mr. Vipond entered his appearance as attorney for the district justices, not as representing the State Court Administrator.

5. On page 6, line 3, of the Brief in Opposition it is stated the issue of judicial immunity was raised by "the Administrative Office." On the contrary, it was raised by the defendant district

(FOOTNOTE 1 CONTINUED)

petitioners were the only parties defendant below. Their lawyers, Messrs. Vipond and Taylor, were employed by the state and county administrative offices, respectively, but the lawyers' appearances were only for the defendants. It is the liability of those judicial officer defendants, and only those persons, for attorney fees, which is at issue on this appeal; that the state, county, or one or the other court administrator may be directed to discharge that liability is beside the point on the issue of judicial immunity vel non.

FOOTNOTE 1 CONTINUED

justices; the administrative office did not take part in the proceedings.

6. Under part IV of the Brief in Opposition, at page 35, the statement is made, without citation of source, that "the State Court Administrator's Office had fully assumed responsibility for the defense of the District Justices." We repeat that this assertion is not supported by the record and is not found in any holding of the District Court. The quotation which follows from the Court of Appeals' opinion is "clearly erroneous," as pointed out in the Petition for Certiorari at 59-60.

II.

The Issue of Judicial Immunity Under § 1988 is Ripe for Determination by this Court in this Case.

Respondents in their Brief in Opposition (Part I A) seek to avoid determination of the immunity issue by arguing that because no award of counsel fees was made by the district court, the issue is not ripe for decision by this Court.

This Court has stated on numerous occasions that it will not decline to review a decision of a lower court solely because some ministerial act remains to be completed upon remand. See, e.g., Johnson v. Muelberger, 340 U.S. 581 (1951); Gulf Refining Co. of Louisiana v. United States, 269 U.S. 125 (1925).

In this case, the Court of Appeals left little leeway for the district court on remand.[2] Clearly, the district court

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[2] The terms of remand are contained in the latter portion of the Court's opinion:

(FOOTNOTE 2 CONTINUED)

has been instructed in no uncertain terms to award fees against petitioners to respondents. The federal question which is at the heart of the petition -- whether the doctrine of judicial immunity protects judicial officers acting in their judicial capacity from awards of attorney's fees

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FOOTNOTE 2 CONTINUED

> "Because the district court proceeded on an erroneous legal premise as to how the award might be framed, we feel it would be better for the district court to consider these arguments in the first instance.
>
> We hold that judicial immunity is not a factor to be considered under § 1988. We will remand to the district court to consider in the first instance the proper framing of the award of attorney's fees. We also note that the parties have stipulated the amount of fees and have raised no issue concerning this on appeal. We leave to the district court whether it nevertheless desires to amplify the record to determine the reasonableness of the fee. We also leave open whether the plaintiffs may recover fees in connection with this appeal."

627 F.2d at 673, Appendix to the Petition for Certiorari at 8b.

under 42 U.S.C. § 1988 (Supp. 1980) -- has been finally decided by the circuit court. All that remains for the district court to do is to determine which entity, among a very limited selection of possibilities, is to bear the brunt of the award.[3] However the district court may decide to "frame the award," as the circuit court directed, it is unquestionable that an award is to be made and that it will be based on the alleged misconduct of the petitioners.

In this setting no policy relating to the review of final decisions will be weakened by this Court's accepting review. On the contrary, to characterize this case as non-final would engender a needless waste of time for litigants and judges alike. Furthermore, it is difficult to

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[3] The circuit court also appears to have given the district court some freedom to determine the amount of the award. This freedom may be of limited value since petitioners stipulated in the trial court that the amount of fees requested by respondents was reasonable.

see how, after the remand, petitioners could again bring the issue of judicial immunity before this Court. After the district court's decree, it would not be open to petitioners to appeal the issue of judicial immunity to the Third Circuit Court of Appeals, for that has already been done and that court has already decided the issue. Under the circumstances, the issue of judicial immunity is ripe for decision by this Court now.

III.

The Existence of § 1988 Judicial Immunity is not Dependent on § 1983 Immunity.

The respondents seek to avoid consideration by this Court of whether judges are immune from fee awards under § 1988 for the reason that the case does not also raise the issue of whether judges are immune from suit under 42 U.S.C. § 1983 (Supp. 1980).

They argue that "[t]he propriety of a fees award under § 1988 in the face of a judicial immunity claim cannot be determined

except by an assessment of that claim with respect to the underlying action under 42 U.S.C. § 1983." (Respondents' Brief in Opposition at 12.) It is asserted that immunity from injunctive relief under § 1983 is "the predicate" to immunity under § 1988 (ibid. at 15), and has not been established.

Respondents are mistaken in believing that Supreme Court of Virginia v. Consumers Union of the United States, _____ U.S. _____, 100 S. Ct. 1967 (1980), stands for the above proposition. Although the language in the opinion in Consumers Union, as quoted in the Brief in Opposition at 12-13, may be read as intimating the validity of the respondents' notion, the issue was not strictly presented or decided in that case. As stated in our Petition for Certiorari at 37-38 n. 13, there are strong reasons for holding that a judge should be held immune from the onus of attorney's fees under § 1988 notwithstanding that he may be subject

to an injunctive decree under § 1983.[4] The rationale for such a holding becomes clear if the artificiality of the distinction between damages and attorney's fees is recognized, for this Court has, on numerous occasions, reaffirmed the immunity of judges from damage awards. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

Finally, we point out that the dismissal of the § 1983 action for mootness also rendered moot any immunity defense to that claim. Furthermore, once the action was mooted, there was no way by which petitioners could have preserved the § 1983 immunity question for appellate review. Thus the effect of respondents' argument is that because the § 1983 action was mooted, the defense of judicial immunity can never be asserted against a demand for fees and

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[4] The several briefs of the Amici which have been filed herein cogently make the same point.

therefore is irretrievably lost. This argument is patently erroneous.

IV.

The Issue of § 1988 Judicial Immunity has not been Waived by Petitioners.

Respondents not only argue that the issue of judicial immunity has been raised prematurely because not ripe for this Court's determination, see part II of this Reply Brief, supra, but also that the issue has been raised too late, and so has been waived.

At the outset, we observe that this argument was not made to the district court or the court of appeals and is therefore itself waived. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Moreover, having invoked the circuit court's appellate jurisdiction and obtained a reversal on the merits of the trial court's immunity holding, it is difficult to see how the Respondents can now be heard to say that petitioners are barred from seeking to appeal to this Court on the

same point of law.

Respondents find waiver in the fact that the district justices did not plead immunity as a defense in their Answer to the § 1983 Complaint for injunctive relief. First, petitioners do not concede that immunity from fees must stand or fall with immunity from prospective relief. See Part III, supra, and the Petition for Certiorari at 37-38 n. 13. Thus it was appropriate for the defense to be raised only with regard to the claim for fees. Furthermore, in 1978, at the time that the petitioners were filing their Answer on the merits, there was no indication in the cases, Consumers Union not having then been decided by this Court, that immunity from fees could depend on immunity from suit. If this dependence is indeed established by Consumers Union, petitioners cannot be held to a standard which would require them to have foretold such a development.

Second, petitioners do not agree

that the immunity issue could not have been raised in the § 1983 proceeding (had it not terminated for mootness) although not originally asserted in their Answer. The Answer could have been amended by consent or with leave of court, which, under the federal rules "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). See Foman v. Davis, 371 U.S. 178 (1962). Moreover, under the local rules of court in the Western District of Pennsylvania, the definition of legal issues which can be decided before trial is handled in pre-trial proceedings at which the governing documents relative to facts and law are the parties' respective "narrative statements." Thus under the practice in this federal district, the legal issue of the applicability of the doctrine of judicial immunity could have been raised at that stage. See Rule 5 II, F and J of the Rules of Court of the United States District Court for the Western District of Pennsylvania, promulgated and effective

June 13, 1977, included in the appendix hereto.[5]

Finally, the fee request properly engendered a completely collateral proceeding in the lower court. Different issues were involved, and a separate hearing was required. Therefore, the petitioners should not be precluded from raising in the collateral proceeding on fees additional defenses appropriate to that proceeding. It would be manifestly unfair to require a litigant to foresee and to plead at the initial pleading stage all relevant facts and possible defenses which he may wish to raise in a subsequent fee proceeding.

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[5] Under the federal rules, certain defenses are waived if not raised either by motion or responsive pleading or an amendment permitted under Rule 15(a) as a matter of course. See Rule 12(h)(1). The defense of official immunity, however, is not one of them. The waived defenses are jurisdiction over the person, improper venue, insufficiency of process or of service of process.

V.

This Court's Decision in New York Gaslight Club, Inc. is not Authority for Awarding Fees under § 1988 to Litigants who Incurred no Such Fees.

In part II of the Petition for Certiorari we argued that neither a past decision by the Third Circuit Court of Appeals (Rodriquez v. Taylor, 569 F.2d 1231 (3d Cir. 1977)), public policy or the legislative history of § 1988 justified the Court of Appeals in holding that legal fees could be awarded under that section to litigants who in fact incurred no fees. See the Petition for Certiorari at 45-52. Respondents oppose a grant of certiorari to review that holding on the ground that this Court has already decided the point in their favor in New York Gaslight Club, Inc. v. Carey, _____U.S._____, 100 S. Ct. 2024 (1980). That case, however, has no applicability here.

In New York Gaslight Club, Inc., the plaintiff in an action under Title VII of the Civil Rights Act of 1964 was represented

by private counsel who had been employed by the NAACP Special Contribution Fund. The district court dismissed the complaint and later denied an application for legal fees under a statutory provision (§ 706(k)) which is in substantially the same language as § 1988. One of the reasons for its holding was that the New York State Division of Human Rights (Division) would have supplied an attorney to present the complaint to the hearing examiner without charge. The Court of Appeals for the Second Circuit reversed the denial of an award for counsel fees, and this court affirmed.

The narrow question presented on appeal, as stated by Mr. Justice Blackmun for the majority, was whether the plaintiff below was a "prevailing party" in an "action or proceeding under this title"; the Court answered affirmatively. Among its other holdings this Court stated that the availability of a Division attorney was not a "special circumstance" which should deprive

a prevailing complainant of a fee award, since it was clear, for reasons fully described by the Court, that "the Division employee does not take the place of private counsel." ____U.S. at _____, 100 S. Ct. at 2033. The Court was influenced by its conclusion that Congress intended to increase the availability of private counsel in Title VII actions. In the case at bar, unlike the situation in Gaslight, no private lawyer was retained and no legal fees were incurred.[6] Similarly distinguishable is Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976),

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6 In footnote 9 of the opinion in Gaslight, by way of dictum (the point had not been raised in the petition for certiorari), the majority rejected the petitioner's (employer's) argument that the respondent's representation by a "public interest group" was a "special circumstance" that should result in denial of counsel fees. _____U.S. at _____, 100 S. Ct. at 2034, n.9. Apparently, the Petitioner argued that the respondent's lawyer's affiliation with or employment by the NAACP Fund somehow served to disqualify him or her as an attorney whose fee could be recovered by a prevailing litigant under § 706(k) of the Civil Rights Act of 1964. This is not the argument made by us in the present case, where respondents' attorneys were paid with public funds by way of salary and respondents were charged with no fees whatsoever.

and other pre-§ 1988 cases upon which the Respondents also rely. In short, the important issue posed in part Il of the Petition for Certiorari has not been decided by this Court and should be decided in the context of this case.

CONCLUSION

We respectfully reiterate our conviction that this Court's writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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December 31, 1980

APPENDIX

Rule 5 of the Local Rules of Court of the United States District Court for the Western District of Pennsylvania, effective June 13, 1977.

RULE 5. CIVIL ACTIONS: PRETRIAL: IMPARTIAL MEDICAL EXAMINATION.

I. Where it appears from the complaint, petition or other pleading that the cause of action arose in one of the following counties: Crawford, Elk, Erie, Forest, McKean, Venango or Warren, and either the plaintiff or defendant resides in one of said counties, the Clerk shall give such complaint, petition or other pleading an Erie number and thereafter such case shall be placed upon the Erie calendar of the Court; all other cases or matters for litigation shall be docketed and processed at Pittsburgh. Any complaint, petition or other pleading or document for an Erie case must be filed in duplicate.

II. Pre-Trial Procedure.

A. There will be a pretrial on every civil case, unless counsel for the parties stipulate in writing to the contrary and approval is given by the judge.

B. Non-jury cases shall be pretried in accordance with an Order by the judge to whom the case has been assigned.

C. In all civil cases involving personal injuries, the following pretrial procedures shall apply when invoked by written notice from the judge to whom the case has been assigned or from the Clerk to counsel of record.

1. All discovery, including medical examinations, which is authorized by the Federal Rules of Civil Procedure shall be completed within 50 days after pretrial has been invoked. Additional medicals will be allowed but only upon Order of Court or written stipulation of the parties. Any other supplemental discovery or extension of time may only be granted after written motion and Order of Court.

2. Within 60 days after pretrial has been invoked, counsel for the plaintiff shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the plaintiff expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

(e) Written authorization to inspect hospital records where plaintiff may have been examined, treated or hospitalized.

(f) The written statement shall set forth a specific statement of all items of special damages, the amounts thereof, the method of computation and a summary of the evidence to be offered in support thereof, together with copies of any exhibits or documents or expert witness reports by which such damages are to be proven.

3. Within 70 days after pretrial has been invoked, counsel for the defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence as a defense at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, togehter with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the defendant expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

4. Within 80 days after pre-trial has been invoked, counsel for the third party defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at the trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

5. (a) Counsel shall make available to opposing counsel for inspection and copying all exhibits which he expects to offer in evidence. Counsel shall mark all exhibits which he expects to offer in evidence. At the pretrial conference, each counsel shall submit to the Court a written list of all exhibits which he expects to offer in evidence. This list shall contain the identifying mark of each exhibit, together with a brief description thereof. It shall be indicated on the written list (1) those exhibits which are to be admitted into evidence by stipulation, (2) as to any exhibit not so stipulated, the grounds for objection, briefly stated, (3) those exhibits to which there is agreement of authenticity and waiver of formal proof, but general objections reserved, and (4) those exhibits which have been marked only for identification and formal proof of authenticity is demanded.

(b) Counsel shall explore the possibility of an amicable settlement and are requested to consult with their clients prior to the conference in order that they shall have authority to compromise the case if a settlement is possible.

(c) Trial counsel, or substitute counsel having full authority to act on behalf of trial counsel, must attend the pretrial conference.

6. One week prior to the actual date of pretrial counsel for the parties shall file with the Court a brief on any disputed question of law.

D. The procedure outlined in paragraph C, insofar as applicable shall be followed in all civil jury cases, but a judge may provide for a special pretrial procedure in any case assigned to him.

E. The judge shall cause a record to be made of the facts and matters agreed upon at the pretrial conference. The record of the pretrial shall be deemed the pretrial order, except that the judge may enter a separate order. The Court may compel agreement as to undisputed facts. Counsel must object to or be deemed to have accepted the pretrial record and any order of the judge entered therein.

F. The Court, at the pretrial conference, may consider motions to continue, to amend, to consolidate, or to sever.

G. Failure to fully disclose in the pretrial narrative statement or at the pretrial conference the substance of the evidence as to liability, defenses, and damages proposed to be offered at the trial, will result in exclusion of that evidence at the trial. The only exceptions will be (1) matters which the Court determines were not discoverable at the time of the pretrial conference, (2) privileged matter, and (3) matter to be used solely for impeaching purposes.

H. When a case is listed for pretrial, it shall not be continued except for just cause. If there is a failure to comply with the pretrial rules, the Court may effect such penalties and sanctions as in the judgment of a judge the circumstances warrant, which may include the dismissal of the plaintiff's cause of action, or the

granting of permission to proceed ex parte, and barring any defendant who fails to comply from offering any testimony. If all parties fail to comply, the action may be dismissed.

I. At the pretrial conference, the Court may inquire as to the possibility of settlement. Any discussion pertaining to settlement shall not be a part of the pretrial order nor be permitted to be used in the trial of the case or any arguments or motions relating thereto. The Court may direct a record to be made of settlement discussions to be available upon order of the Court.

J. After a case has been pretried, no amendment to any pretrial statement or other pleading shall be presented to the Clerk for filing unless authorized at the pretrial conference. Otherwise a party may amend only by leave of the Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

III. Impartial Medical Examination, Report and Testimony.

A. In any case involving the medical condition of a party, a judge on his own motion, for any reason including assistance in pretrial proceedings or in further settlement, or by agreement of the parties or by an affidavit by one of the parties setting forth the need, may refer the case to an impartial medical expert. The expert will be a member of a panel of examining physicians designated by the Allegheny County Medical Society after consultation with a committee appointed by the President of the Allegheny County Bar Association, and which panel shall include specialists in the various medical fields.

B. Copies of all available medical reports or hospital records shall be furnished by counsel to the medical expert who shall review them, examine the party and forward his report and opinion to the judge, with copies to counsel for each of the parties. As part of his report, the medical expert shall answer the following question:

> Considering all the facts presented, and based on your examination of the party, is the proposed medical testimony of any doctor who may be called as a witness in this case such that in the present state of medical science a reasonable medical scientist could not accept it either as to diagnosis, causal connection or prognosis?

C. If the answer to this question is "Yes" and the case proceeds to trial, the medical expert may be called as a witness by the judge or by any party to the action as an impartial medical expert appointed by the judge and his testimony submitted to the jury under proper instruction from the judge.

D. If the answer to this question is "No", the medical expert may be called as a witness by any party to the action, but he shall not be identified as having been appointed as an impartial medical expert.

E. If the case does not proceed to trial or if the medical expert is not called as a witness at the trial, or is called as a witness by the judge, his compensation shall be paid equally by each party to the litigation, unless the judge in his discretion orders payment to be made otherwise in order to meet special factual situations.

F. If the medical expert is called as a witness at the trial by any party, his compensation shall be paid by that party.

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 1980, three copies of the within Reply Brief were mailed, postage prepaid, to Timothy P. O'Brien, Esquire, counsel for Respondents, Neighborhood Legal Services Association, 10th Floor, Allegheny Building, 429 Forbes Avenue, Pittsburgh, Pennsylvania 15219. I hereby further certify that all parties required to be served have been served.

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December 31, 1980

No. 80-620

In The

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE HONORABLE LAWRENCE H. COOKE, CHIEF JUDGE OF THE STATE OF NEW YORK

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE HONORABLE LAWRENCE H. COOKE, CHIEF JUDGE OF THE STATE OF NEW YORK

INTEREST OF THE AMICUS CURIAE

The petition for certiorari of the petitioners in this action presents crucial issues concerning the scope of judicial immunity under 42 U.S.C. §1988. The United States Court of Appeals for the Third Circuit held that Congress, in enacting a right to award attorneys' fees for actions under certain civil rights laws, abrogated the common law rule that judges are immune from suit for monetary relief for acts performed in their official judicial capacities.

The *amicus curiae* is the Chief Judge of the State of New York and the Chief Judge of the New York State Court of Appeals. He is responsible for, *inter alia*, the administration and operation of the entire Unified Court System of the State. New York State Constitution, Article VI, §28. As Chief Judge, he must insure that the New York state courts operate effectively, free from any improper influences that may taint the impartial administration of justice. The decision of the Third Circuit in this action presents a direct threat to independent judicial decision-making.

BRIEF SUBMITTED PURSUANT TO RULE 36.1

The Honorable Lawrence H. Cooke, Chief Judge of the State of New York, submits this brief in *amicus curiae* pursuant to Rule 36.1 of the United States Supreme Court Rules with the consent of all of the parties.

SUMMARY OF ARGUMENT

The common law rule of absolute judicial immunity from suits for monetary relief is one of the underpinnings of the judicial system, evolving from the long-standing recognition that judges cannot properly perform their judicial roles if they are subject to harassment and intimidation through lawsuits for

monetary awards by dissatisfied litigants. Actions for attorneys' fees are no less a coercive instrument than actions for damages; the amounts of money involved are often substantial.

Congress can limit the well-established common law principle of judicial immunity only by express direction. *Pierson v. Ray,* 386 U.S. 547 (1967). In enacting 42 U.S.C. §1988, Congress did not expressly provide that the doctrine of absolute judicial immunity be abrogated. To the contrary, the debates in both the Senate and the House unequivocably indicate that the attorneys' fees bill was enacted to correct a legal technicality and to leave the common law unchanged. There is no legislative intent that the doctrine of absolute judicial immunity be subverted by monetary awards granted under the guise of attorneys' fees.

ARGUMENT

I.

JUDGES ARE IMMUNE FROM LIABILITY FOR ATTORNEYS' FEES IN ACTIONS PURSUANT TO 42 U.S.C. §1988.

A. The common law concept of absolute judicial immunity forecloses demands against judges for attorneys' fees.

"Few doctrines [are] more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." *Pierson v. Ray, supra,* 386 U.S. at 554-555. This doctrine, prevailing in English jurisprudence for centuries, was established as the "American Rule" in *Bradley v. Fisher,* 13 Wall. 335 (1872).

Absolute immunity insures that "a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. . . ." *Id.* at 345; it enhances "principled and fearless decision-making." *Pierson v. Ray, supra,* 386 U.S. at 554; *Stump v. Sparkman,* 435 U.S. 349 (1978). "Absolute immunity is thus necessary to assure that judges . . . can perform their respective functions without harassment or intimidation." *Butz v. Economou,* 438 U.S. 478, 512 (1978).

Actions for attorneys' fees are no less coercive than actions for damages; attorneys' fees often are substantial, and the same interests underlying judicial immunity are thus involved — the fears of "intimidation" and the erosion of the public interest in an independent judiciary. Justice Powell, in his dissenting opinion in *Maine v. Thiboutot,* ____ U.S. ____, 100 S. Ct. 2502 (1980), presaged the onslaught of "harassment" and "intimidation" which might virtually eliminate the judicial independence of judges once they are exposed to liability for attorneys' fees, stating that "[t]here is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees . . . ingenious pleaders may find ways to recover fees in almost any suit against a state defendant." 100 S. Ct. at 2514.

Judges are an especially vulnerable target of these "ingenious pleaders"; though immune from damage actions pursuant to §1983, they continually will be subject to allegations of constitutional due process violations by reason of rulings made in cases over which they preside. It takes no great degree of legal skill to append a claim for injunctive or declaratory relief to an action for damages in order to preserve the right to a trial on the nonmonetary aspects of the claim, with the concomitant right to attorneys' fees, notwithstanding a dismissal of the monetary aspect of the relief sought. Indeed, issues

normally raised by the vehicle of a mandamus proceeding easily can be re-stated as constitutional claims against judges under the civil rights acts, regardless of whether a damage claim is asserted.

That "costs" rather than "damages" are the relief sought does not lessen the impact on judicial independence. Insofar as the liability of a judge is concerned, the label is irrelevant. *Cf. Johnson v. University of Bridgeport and Local 1199, Drug and Hospital Union,* ___ F.2d ___ (2d Cir., Docket Nos. 80-7350, 80-7374, decided August 28, 1980), in which the Court of Appeals for the Second Circuit noted that statutorily authorized attorneys' fees are no different from attorneys' fees that are a contractually stipulated element of damages. Attorneys' fees granted pursuant to §1988 are but another form of financial liability that can be used as a weapon against judges in violation of the very interests this Court has held protected by the concept of absolute judicial immunity.

Nor does it matter whether the demand for attorneys' fees is made against the judge in his official capacity, as opposed to his individual capacity. The cases applying absolute immunity to judges make no distinction as to how monetary awards ultimately may be paid; judicial immunity never has depended upon whether a state may have a "hold harmless" statute.[1] *See e.g.,* McKinney's Consolidated Laws of the State of New York, Public Officers Law, §17. The issue is whether the judge can be subject to the intimidation of a lawsuit that extracts a monetary

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1. Monetary awards paid out of a court's budget may have a significant inhibiting effect on judicial independence. Many judiciary budgets would be sharply affected by the payment of any monetary awards. This is particularly true of small localities, where an attorneys' fees award against a local magistrate may severely strain the local fisc and affect funding for court operations. It is a fiction to believe that judges would not be intimidated by the threat of a suit for attorneys' fees simply because the money would not come out of their own pockets.

award for acts performed by the judge. Application to judges of the attorneys' fees provision of §1988 would provide for the very type of intimidating litigation that has been foreclosed by the common law for centuries.[2]

B. Congress did not erode any existing common law immunities for judges in enacting §1988.

Absolute immunities so firmly rooted in the common law and supported by such strong public policy reasons are not easily abolished. *Imbler v. Pachtman,* 424 U.S. 409, 435 (1976) (concurring opinion); *Pierson v. Ray, supra,* 386 U.S. at 554; *see also, Owen v. City of Independence, Missouri,* ___ U.S. ___, 100 S. Ct. 1398, 1424 (1980) (dissenting opinion). Abrogation of such immunities must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it" (*Owen v. City of Independence, Missouri, supra,* 100 S. Ct. at 1409, quoting *Imbler v. Pachtman*) and is dependent on a "clear indication" that the Legislature "specifically" intended to abolish the common law immunity. *Pierson v. Ray, supra,* 386 U.S. at 554, 555; *cf. Supreme Court of Virginia v. Consumers Union of the United States, supra,* 100 S. Ct. at 1978.

The sole basis for the Third Circuit's erroneous conclusion that "Congress expressly considered judicial immunity and

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2. This brief does not address the question whether the absolute immunity of judges extends to suits for declaratory or injunctive relief absent monetary awards, a question left open by this Court in *Supreme Court of Virginia v. Consumers Union of the United States,* ___ U.S. ___, 100 S. Ct. 1967 (1980). Since, as set forth above, attorneys' fees are equatable with monetary damages for the purpose of determining the applicability of the doctrine of judicial immunity, there is no need for this Court to reach that question. If judges were absolutely immune from any lawsuits whatever, they, of course, would not be subject to §1988 attorneys' fees awards. *Consumers Union, supra.*

decided to abrogate it under §1988," is a single sentence in a House Report:

> "Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected."[3]

The history of the enactment of §1988 shows beyond a doubt that this sentence is not indicative of the legislative intent. *Cf. Supreme Court of Virginia v. Consumers Union, supra.*

Bills to add an attorneys' fees provision to certain civil rights statutes were drafted by the Judiciary Committees of both

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3. A general reference to common law immunities hardly suffices to specifically abrogate judicial immunity. There is a significant difference between the qualified immunity enjoyed by certain executive officers and the absolute immunity of judges. Absolute immunity "defeats a suit at the onset"; qualified immunity "depends upon the circumstances and motivations of [the official's] actions as established at trial." *Imbler v. Pachtman, supra,* 424 U.S. at 419, fn. 13; *see Scheuer v. Rhodes,* 416 U.S. 232, 239 (1974). The rationale underlying absolute judicial immunity is to foreclose the intimidating threat of a trial; qualified immunities do not serve the same function. In the absence of any language specifically referring to judicial immunity, the sentence in the House Report, at most, can be referring only to qualified executive immunities, since attorneys' fees are post-trial awards — a stage not reached in cases involving absolute immunity. It must be concluded that the bare citation of *Pierson v. Ray* in a footnote in the House Report relates only to the holding in that case that police officers may raise the special good faith and probable cause defenses at trial for acts in their official capacities. *Pierson v. Ray, supra,* 386 U.S. at 551-552, 555-558.

the Senate (S.2278) and the House of Representatives (H.R.15460). The bills were substantially identical, except that the Senate bill did not contain a reference to Title IX of the Civil Rights Act. *See* 122 Cong. Rec. 31472. The Senate bill was debated and passed by the Senate in a version that added the reference to Title IX and, in addition, added a provision pertaining to proceedings under the Internal Revenue Code. 122 Cong. Rec. 33312. The House bill never reached the floor of the House; instead, the House debated and passed the Senate bill that already had been passed by the Senate. 122 Cong. Rec. 35130.

The Senate Report, by its Judiciary Committee [S. Rep. No. 94-1011, 94-1011, 94th Cong., 2d Sess. 1 (1976), *reprinted* in U.S. Code Cong. & Ad. News 5908] contains not a hint that any established common law immunities were to be affected by the bill. The stated purpose of the bill in the Senate Report was simply to make consistent the patchwork provisions for attorneys' fees in various civil rights legislation, in light of this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1976), that statutory authority was needed to award attorneys' fees under those acts. S. Rep. No. 94-1011, *supra*, at 4; U.S. Code Cong., *supra*, at 5911. The Senate Report concludes (*id.* at 6, U.S. Code Cong. at 5913):

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's (Alyeska) decision."

Moreover, when the bill was debated on the floor of the Senate, nothing was said about common law immunities. 122 Cong. Rec. 31271, 31470-31483, 31487-31490, 31829-31835,

31846-31858, 31868, 32171-32172, 32175-32176, 32183-32185, 32296-32298, 32383-32384, 32387-32398, 32405, 32926-32927, 32929-32934, 33310-33315. As Senator Kennedy, the floor leader of the bill (122 Cong. Rec. at 31473), explained (*id.* at 31472):

> "The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws."

The House debated the Senate bill, which already had been passed. Here, as well, nothing was said about immunities. *See id.* at 35114-35130. To the contrary, Representative Drinan, the author of the House bill (*id.* at 35116) stated:

> ". . . [T]here is no change in the substantive preexisting law in this case before this body at this time. We accept preexisting law, whatever it is . . . ." (122 Cong. Rec. at 35116).
>
> * * *
>
> "We do not create any new statutory right of action in the bill today." (122 Cong. Rec. at 35117).
>
> * * *
>
> "I think [attorneys' fees are] . . . all carefully regulated by a body of law which goes back at least 50 years, and this would not be necessary,

> namely, to put through a law at all had it not been for a technical decision in the U.S. Supreme Court." (122 Cong. Rec. at 35118).

Indeed, Respresentative Kastenmeier, the chairman of the House subcommittee studying these bills (122 Cong. Rec. at 35126), stated (*id.*):

> ". . . [T]his is only a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case."

The authors of the House bill, in explaining the Senate bill to their colleagues, thus contradicted the one sentence in the House Report, relied on by the Third Circuit, referring to immunity defenses. The expressions of the authors of the bill are entitled to substantial weight, *see, e.g., Brown v. General Services Administration,* 425 U.S. 820, 828 (1976), and they should be held to be controlling here.

Even if that one sentence in the House Report can be given any weight in the face of the House debates, it cannot form the basis of legislative intent. The intent of Congress cannot be inferred from the report of one committee: Congress "as a whole" must be aware of an issue. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 192 (1978). Where House and Senate reports differ as to the interpretation of language in a bill, the House Report cannot be relied upon where, as here, by passing the Senate bill without amendment, the House denied the Senate Committee and the entire Senate an opportunity to object to (or concur with) the interpretation written in the House Report. *Vaughn v.. Rosen,* 523 F. 2d 1136, 1142-1143 (D.C. Cir. 1975); *Hawkes v. Internal Revenue Service,* 467 F. 2d 787, 797 (6th Cir. 1972); *see* Davis, *Administrative Law Treatise,* (1970 Supp.) §3A.31 at 175.

In light of this legislative history, it was manifestly erroneous for the Third Circuit to infer congressional intent from a single sentence in a House Report that never was before the Senate, and the substance of which was contradicted in the Senate Report, the Senate debates and the statements by the floor leaders of the bill in the House itself. There is no "clear indication" that Congress "specifically" overrode the well-established immunity protecting judges against suits for monetary relief for acts in their judicial capacities. *Pierson v. Ray, supra.*

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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No. 80-620

IN THE

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MAHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SCHAFFER, MILTON H. RICHAEL, Individually and as District Magistrates in the County of Beaver and the Successors in Office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RATCHEL DAWKINS, GEORGE BLACK, and All Others Similarly Situated,

Respondents.

BRIEF OF THE STATES OF DELAWARE, MISSISSIPPI, VERMONT, NEW HAMPSHIRE, NORTH CAROLINA AND IOWA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MAHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SCHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and the successors in office,

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v.

PATRICIA MORRISON, BLANCHE LOWE, RATCHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

BRIEF OF THE STATES OF DELAWARE, MISSISSIPPI, VERMONT, NEW HAMPSHIRE, NORTH CAROLINA AND IOWA, AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTERESTS OF THE AMICI CURIAE

The States of Delaware, Mississippi, Vermont, New Hampshire, North Carolina and Iowa sponsored by their Attorneys General file this brief in support of the issuance

of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to Supreme Court Rule 36.4. Like each of the sovereign states, the Amici States have a Judicial Branch of government in which the judicial power is vested. The States are interested in maintaining a Judicial Branch capable of administering justice without fear of incurring liability for attorney's fees in actions in which its members are otherwise absolutely immune from suit. Furthermore, the States have an interest in insuring that attorney's fees are awarded pursuant to 42 U. S. C. § 1988 only when the prevailing party has or would have incurred such expenses and where the action on which he prevailed has a direct causal link to the relief which he obtained.

SUMMARY OF ARGUMENT

The common law doctrine of absolute judicial immunity bars the award of attorney's fees under 42 U. S. C. § 1988 against judicial officers acting in their judicial capacity. The Constitutional guarantee to the states of a "republican form of government" requires the maintenance of a "free and independent" judiciary unfettered by threats of collateral attacks and monetary liability for actions within the sphere of their official duties. Without reaching the constitutional issue, however, it is clear that the Court of Appeals incorrectly concluded that there was clear and express evidence of congressional intent to waive judicial immunity.

The Court of Appeals erred in concluding that plaintiffs had "essentially succeeded" on their claims where there was no showing that their conduct played a significant role in obtaining the result which they sought. The "material factor" test adopted by the Court of Appeals as applied here would foreclose any exercise of discretion conferred on the District Court by the statute to award attorney's fees where appropriate.

Finally, even prevailing parties are not entitled to an award of attorney's fees when they incur no such costs. No important right would be vindicated by such a result and it would in fact skew the enforcement of the civil rights laws.

ARGUMENT

I. The Doctrine of Judicial Immunity Bars an Award Against Judges for Attorney's Fees Under 42 U. S. C. § 1988.

This Court has repeatedly concluded that judicial officers have complete and absolute immunity for the performance of their judicial duties. *Bradley v. Fisher,* 13 Wall. 335 (1872); *Dennis v. Sparks,* — U. S. —, 49 U. S. L. W. 4001 (1980); *Pierson v. Ray,* 386 U. S. 547 (1967); *Stump v. Sparkman,* 435 U. S. 349 (1978); *Supreme Court of Virginia v. Consumers Union of the United States,* — U. S. —, 64 L. Ed. 2d 641 (1980). In *Stump v. Sparkman, supra,* this Court recently rearticulated the compelling basis for judicial immunity:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable to suits under § 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, for the

> legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson v. Ray*, 386 U. S. 547 (1967).

Stump v. Sparkman, 435 U. S., at 355-356.

This absolute judicial immunity from suit, analogous to that of the coordinate legislative branch of government *Tenney v. Brandhove*, 341 U. S. 367 (1951), has its roots in logic, rationality, and practicality. For a judiciary whose decisions in administering justice are subject to attack in collateral preceedings can be neither free nor independent. In such circumstances, the administration of justice, regrettably, will be tainted by an all-too-human concern for culpability in decision making. The litigants and the public, both of whom rely on the integrity and independence of the judiciary, would be ill-served by even the mere possibility of such an outside influence weighing on the process.

In the case before the Court, the Third Circuit ignored its own prior teachings on the issue of the constitutionality of subjecting judicial officers to liability for suit under the Civil Rights Act. In *Bauers v. Heisel*, 361 F. 2nd 581 (3rd. Cir. 1966), the *en banc* Court concluded that Article 4, ∫ 4 of the United States Constitution, which guarantees to each of the States a Republican Form of Government, presented a constitutional impediment to finding a waiver of judicial immunity in the Civil Rights Act of 1871. In *Bauers* the Third Circuit squarely concluded that:

> The framers of the Constitution clearly evidenced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 *et. seq.*, 494 *et seq.* We believe that the abro-

> gation of judicial immunity by Congress would destroy the independence of the judiciary of the various States, and consequently deprive them of a republican form of government. The language of the Supreme Court in *Bradley v. Fisher,* 80 U. S. (13 Wall.) 335, 347, 20 L. Ed. 646, lends support to our conclusion.
>
> ". . . [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of a judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*"

Bauers v. Heisel, 361 F. 2d, at 588-589 (emphasis in the original).

If a predicate for liability for attorney's fees under § 1988 is amenability to suit under § 1983 then the logic of the Third Circuit's *en banc* decision on the constitutional issue in *Bauers* requires the conclusion that there is no liability for fees because there is no exposure to suit on the underlying facts.[1]

However, this Court need not reach the constitutional issue because it is patent that, contrary to the as-

1. We concur in Petitioners' argument that the application of the principles of *Tennoy v. Brandhove,* 341 U. S. 367 (1951) requires that judicial as well as legislative officers are immune from suit not merely from liability in money damages. Petition for Writ of Certiorari, pp. 37-38 fn. 13. We also agree that even if immunity extends only to liability from damages, the rationale for such immunity would be severely eroded by awarding fees against the judicial officer. *Id.* at 39.

sertion of the Court of Appeals, there is no clear or express evidence of an intention on the part of the Congress to abolish the doctrine of absolute judicial immunity. That the historical foundation for judicial immunity rests in the common law has been recognized by this Court and indeed by the Court of Appeals for the Third Circuit. *See Bradley v. Fisher,* 13 Wall. 335, 347-354 (1872); *Dennis v. Sparks,* — U. S. —, 49 U. S. L. W. 4001, 4002 (1980); *Bauers v. Heisel,* 361 F. 2d 581, 587 (1966).

For the Congress to enact legislation in derogation of such common law immunities, it must make its statutory purpose evident. *Isbrandtsen Co. v. Johnson,* 343 U. S. 779, 783 (1952); *see also Bauers v. Heisel,* 361 F. 2d 581, 587 (1966); *Paiewonsky v. Paiewonsky,* 446 F. 2d. 178, 180-181 (1971); *Martinez v. Bethlehem Steel Corp.,* 78 F. R. D. 125, 129 (E. D. Pa. 1978).

The indication of intent to waive the common law doctrine of judicial immunity ascribed to the Congress by the Court of Appeals is far from clear and is more correctly characterized as very ambiguous. According to the Court of Appeals:

> The legislative history of section 1988 indicates that Congress expressly considered judicial immunity and decided to abrogate it under section 1988. The House Report states:
>
> > Furthermore, while damages are theoretically available under statutes covered by [§ 1988], it should be observed that, in some cases, the immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.
>
> H. Rep. No. 94-1558, 94th Cong., 2nd Sess. 9 (1976).

> Footnote 17 contains a citation to *Pierson v. Ray,* 386 U. S. 547 (1967), the case where the Supreme Court indicated that Congress could abrogate judicial immunity. See generally *Supreme Court of Virginia v. Consumers Union,* 100 S. Ct. 1967, 1977-78 (1980). *We believe that this is sufficient indication that the Congress has exercised the choice left to it by Pierson by enacting § 1988.*

Morrison v. Ayoob, 627 F. 2nd 669 (3rd. Cir. 1980), Appendix to Petition for Writ of Certiorari, at 6b-7b. We respectfully submit that the footnote reference found dispositive by the Court of Appeals does not provide sufficient indication that the Congress intended to abrogate judicial immunity.[2]

The entire footnote number seventeen in the House Report consists of citations to the cases: *Wood v. Strickland,* 420 U. S. 308 (1975); *Scheuer v. Rhodes,* 416 U. S. 232 (1974); and *Pierson v. Ray,* 386 U. S. 547 (1967). *Wood* and *Scheuer* articulate standards for the concept of official immunity. *Pierson,* while reaffirming the immunity of a judicial officer from suit under § 1983, also recounted the special defenses of good faith and probable cause to arrest available to law enforcement officers in § 1983 actions. As *Pierson* is the only case cited in the footnote which deals with the doctrine of special defenses, we respectfully suggest that it was included in the footnote as illustrating a case where "special defenses" referred to in the body of the Report exists rather than for its holding on judicial immunity. However, there is no

2. It is noteworthy that the Senate rather than the House version of the bill was enacted. The Senate Report makes it quite clear that no change in existing judicial immunity was contemplated. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

basis for concluding that the footnote constitutes an indication of congressional intent to abrogate the common law doctrine of absolute judicial immunity.

We find it difficult to believe that the Congress would be so cavalier in disposing of judicial immunity in the face of the long standing and clearly articulated reasons for such immunity. As *Pierson* itself teaches:

> The immunity of judges for acts within the judicial role is equally well established [as that of legislators acting within the legislative role], and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Pierson v. Ray, 386 U. S. at 555. We respectfully suggest that the Court of Appeals was in error in relying on the above quoted section of the House Report and that the immunity of the judiciary remains absolute.

Because of the significance of this question to the continued functioning of the Judicial Branch we respectfully request this court to grant it plenary consideration.

II. The Plaintiffs Were Not Prevailing Parties and Are Therefore Not Entitled to an Award of Attorney's Fees.

Section 1988 permits the award of reasonable attorney's fees to the "prevailing party" as part of the costs. This Court has held that the availability of fees is not conditioned "on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated"—a plaintiff who prevails "through settlement rather than through litigation" may be awarded fees, *Maher v. Gagne*, — U. S. —, —, 48 U. S. L. W. 4891, 4893, (1980). This is consistent with the legislative history of section 1988:

> For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through consent judgment or without formally obtaining relief.

S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in (1976) U. S. Code Cong. & Admin. News, pp. 5908, 5912.

In order for a party to be a "prevailing party" within the meaning of section 1988, the Court of Appeals has required a showing of "essential success" on the claims. *Hughes v. Repko*, 578 F. 2d 483, 487 (3rd Cir. 1978). *See also Switlowich v. County of Bucks*, 620 F. 2d 33 (3d Cir. 1980); *Bagby v. Beal*, 606 F. 2d 411 (3rd Cir. 1979). However, before plaintiffs can be said to have "vindicated their rights" or to have "essentially succeeded" on their claims, their conduct must be shown to have played a significant role in achieving their objectives. *Aspira of New York, Inc. v. Board of Educ.*, 65 F. R. D. 541 (S. D. N. Y. 1975), cited with approval in the legislative history quoted above.[3] *Chicago Police Officer's Association v. Stover*, 624 F. 2d 127 (10th Cir. 1980); *Ross v. Horn*, 598 F. 2d 1312, 1322 (3rd Cir. 1979), cert. denied, 48 U. S. L. W. 3846 (1980). As a practical matter, actions taken by a "prevailing party" to vindicate civil rights must be so closely connected with the result and be of such significance as to justify the Court in awarding attorney's fees.

As indicated by the Court of Appeals, "the only evidence of record" as to causation in this case was provided

3. The Court in *Aspiria, supra* awarded attorney's fees under the Emergency School Aid Act, 20 *U. S. C.* § 1617, to plaintiffs after a consent decree had been entered. Plaintiffs were found by the Court to have prevailed, because "the 'compliance' achieved in this case would not have happened, certainly not as early or as thoroughly as it has, without the initial and continued impact of plaintiffs' action." 65 F .R. D. at 544.

by plaintiffs' counsel, "who testified that he had investigated the matter and found violations before the action was filed but few after." Counsel for plaintiffs further testified that he communicated with some of the defendants informally prior to filing of this suit. After the action was filed, counsel for both sides met and discussed the case. The Court of Appeals determined that this sequence of events "strongly suggests that the action was a material factor in bringing about the defendants' change in conduct." Accordingly, the Court of Appeals declined to hold that the district court was clearly erroneous in finding plaintiffs to be prevailing parties.

We submit that a determination of causation based on a "material factor" test, such as employed by the Court of Appeals in this case, is insufficient to establish prevailing party status for purposes of section 1988. As a matter of proof, a "prevailing party" must, of course, introduce evidence that it is more likely than not that his actions constitute a material element and substantial factor in effectuating a resolution of the dispute in his favor. However, the analysis of causation cannot logically rest without a conclusion being drawn as to whether the action taken by the party seeking attorney's fees is so significant and important a cause that the other party, in all fairness, should be legally responsible to pay. That this second factor is anticipated under section 1988 is evident in the language therein relating to the Court's discretion. Under the approach adopted by the Court of Appeals, however, the trial court is effectively foreclosed from exercising discretion to refuse to award fees once it is evident that the plaintiff's efforts are a *sine qua non* of the relief requested. Although such efforts may be a necessary antecedent in any final resolution of the matter, it does not stand to reason that the burden of attorney's fees should be shifted to an adverse party (the State) without a de-

termination by the Court that the connection between the defendant's duty to avoid violation of civil rights and the consequences which flow from breach of such responsibility is sufficient to warrant the imposition of a monetary assessment.

We respectfully submit that the Court of Appeals was mistaken when it ruled that the record supports the finding by the district court that plaintiffs have prevailed within the meaning of section 1988. The record reflects no more of probative value than that the action requested in the complaint actually transpired after the complaint was filed. Even if it is assumed that this would not have occurred as it did without the impetus of plaintiff's lawsuit, the Court below erred in awarding fees without first determining, on the record, that the plaintiffs' actions were both closely related to the result requested; and, were of such significance as to justify an award of attorney's fees.

Because attorney's fees may only be awarded to a "prevailing party" under section 1988, the proper determination as to who may constitute a prevailing party is particularly important. Since the lower courts have not provided a careful and comprehensive standard based on burden of proof and causation, a clarifying decision by this Court is requested.

III. Plaintiff Incurred No Compensable Costs Which May Be Awarded Against Public Officers.

The Civil Rights Attorney's Fees Awards Act of 1976 amended 42 *U. S. C.* § 1988 to provide in relevant part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the Court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs*. (Emphasis supplied).

In providing that, "as part of the costs," attorney's fees may be awarded to the prevailing party, the plain language of the Act reveals that Congress meant to indemnify the successful party against the expense of asserting fundamental rights. That purpose is evident in the legislative history of the Act:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the laws has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to *recover what it costs them to* vindicate these rights in Court. Senate Report No. 94-1011, 94th Cong., 2d Sess., 1976 U. S. Code Cong. & Admin. News 5908, 5910 (emphasis supplied).

This Court in *Hutto v. Finney*, 437 U. S. 678 (1978), ruled that the Eleventh Amendment does not bar attorney's fee awards in federal courts because such awards are part of the costs—which "have traditionally been awarded without regard for the State's Eleventh Amendment immunity." *Id.*, at 695. The Court was careful to add, however, that a formal indication of congressional intent to abrogate the State's Eleventh Amendment immunity would be required if the concept of costs were to be expanded "beyond the traditional category of litigation expenses" *Id.*, at 697 fn. 27. Otherwise, the States could be exposed to "enormous financial burdens" without careful thought. *Employees v. Missouri Public Health & Welfare Dept.*, 411 U. S. 279, 284 (1973). An award of costs has traditionally been limited to "compensating a successful litigant for the expense of his suit," *Hutto, supra* at 697, fn. 27.

The plaintiffs in this action are represented by Neighborhood Legal Services—a public interest law firm which

receives all of its funding from the Commonwealth of Pennsylvania and the federal government. Plaintiffs have neither been charged, nor have they paid, any attorney's fees. Nevertheless, the Court of Appeals held that a fee award is proper, relying on its decision in *Rodriguez v. Taylor*, 569 F. 2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U. S. 913 (1978).

In *Rodriguez*, the City of Philadelphia was found to have discriminated against an aspiring security guard on the basis of his age in violation of the Age Discrimination in Employment Act of 1967, 29 *U. S. C.* §§ 621-634 (1970 & Supp. IV, 1974) (ADEA). Plaintiff's legal counsel, Community Legal Services, Inc. was awarded attorney's fees under 29 *U. S. C.* § 626(b) and 29 *U. S. C.* § 216(b), which provide:

> "The court . . . *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." (Emphasis supplied).

The *Rodriguez* court held that publicly funded legal services organizations were not barred from receiving mandatory attorney's fee awards under ADEA. The Court reasoned that statutorily authorized awards are "designed to encourage private enforcement of individual rights and deter socially harmful conduct." *Rodriguez, supra* at 1245. Neither objective is apposite here since an award is unnecessary to any vindication of plaintiffs' civil rights and the conduct sought to be deterred has been discontinued.

By applying the mandatory standard for awarding fees set under ADEA to 42 *U. S. C.* § 1988, the Court of Appeals decision severely restricts the broad discretion afforded to the trial court under section 1988. The ruling operates to make it an abuse of discretion for the trial

court to deny an award of attorney's fees on the basis that no attorney's fees were incurred—an inherently absurd result. Since attorney's fees may not be awarded under § 1988 except as part of the costs actually incurred by the successful litigant, the trial court should not be placed in the position of committing error by considering whether the prevailing party is obligated to pay attorney's fees.

More importantly, the Court of Appeals has joined the ranks of several other federal courts which have approved awards of attorney's fees to publicly funded legal service organizations for successful representation of civil rights litigants against governmental entities, as an incentive to pursue further civil rights enforcement litigation.[4] We submit that to award attorney's fees for this purpose—rather than as reimbursement for expenses borne by the prevailing party in vindicating fundamental rights—expands the concept of costs far beyond "traditional litigation expenses" and exposes the States to enormous financial burden. Since express statutory authorization to award attorney's fees where none have been incurred does not exist, a major new intrusion into state sovereignty has been created, resulting in a significant erosion of the immunity conferred by the Eleventh Amendment.

Because the Court of Appeals has vastly expanded the traditional concept of costs through misplaced reliance on a decision construing a differently worded statute in a way which, we submit, distorts the purpose of section 1988 and violates the Eleventh Amendment, we invite this Court to address the issue.

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4. See, for example: *Lund v. Affleck*, 587 F. 2d 75 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc. v. G & V, Inc.*, 578 F. 2d 34 (2nd Cir. 1978); *Perez v. Rodriguez Bou*, 575 F. 2d 21 (1st Cir. 1978); *Torres v. Sachs*, 538 F. 2d 10 (2nd Cir. 1976); *Aware Woman Clinic v. City of Cocoa Beach*, 629 F. 2d 1146 (5th Cir. 1980); *Bills v. Hodges*, 628 F. 2d 844 (4th Cir. 1980).

CONCLUSION

This case presents questions of fundamental importance to the maintenance of the independence of the Judicial Branch of government and the bases for state liability for attorney's fees. This Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 80-620

DEC 10 19

MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND THE SUPREME COURT OF THE STATE OF MINNESOTA, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND THE SUPREME COURT OF THE STATE OF MINNESOTA, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The State of Minnesota and its Supreme Court, through the Minnesota Attorney General, respectfully offer this brief as *amici curiae*, in support of the petition for a writ of certiorari. As the highest court of the State of Minnesota, the Minnesota Supreme Court has inherent supervisory authority over the conduct of proceedings in all courts of the State, and has appellate jurisdiction for the correction of any constitutional errors which they may commit. If the construction of 42 U.S.C. § 1988 adopted by the Court of Appeals in this action is upheld, the judges of the courts of Minnesota will become potentially liable for substantial awards of attorney's fees in actions brought under 42 U.S.C. § 1983. The Minnesota Attorney General, as the chief legal officer of the State, has responsibility for defending those actions. For these reasons, the *amici* have a substantial and continuing interest in the case at bar.

SUMMARY OF ARGUMENT

From the earliest days of the common law, judges have been held absolutely immune from civil liability for their judicial acts, in recognition of the destructive effect which harrassing suits and potential liability would have on the independence of the judiciary. To award attorney's fees against judges under 42 U.S.C. § 1988 would be equally destructive, and would inhibit fearless and independent decision-making. Such a result should not lightly be imputed to Congress, and neither the statute on its face nor the legislative history manifests an intention to abrogate this ancient and honored doctrine. Moreover, the concerns which gave rise to judicial immunity are fully applicable to actions for declaratory and injunctive relief,

and, in the absence of a clear congressional intent to discard that immunity, judges should be held immune from § 1983 actions for prospective relief. This conclusion is buttressed by the availability of alternative forums for the vindication of individual rights and by comparison with the immunity afforded to legislators.

ARGUMENT

I. JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AGAINST JUDGES UNDER 42 U.S.C. § 1988.

This case presents the important and unresolved question whether attorney's fees under 42 U.S.C. § 1988 may be awarded against a judge acting in his judicial capacity. The Court of Appeals for the Third Circuit has in this case approved such an award. This ruling threatens the independence of state judges, and is contrary to the deeply-rooted policies which underlie the principle of judicial immunity.

As this Court has often observed, the absolute immunity of judges for acts committed within their judicial jurisdiction has roots extending to the earliest days of the common law; few doctrines are more solidly established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 418, 422, n.20 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Indeed, the Court whose decision is questioned here, the Court of Appeals for the Third Circuit, has itself suggested that judicial immunity is so essential to the independence of the judiciary that it may be constitutionally mandated under the Guarantee Clause, as an indispensable attribute of a republican form of government. *Bauers v. Heisel*, 361 F.2d 581, 588, 589 (3d Cir. 1966), *cert. den.* 386 U.S. 1021 (1967).

From this Court's adoption of the immunity doctrine, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), to its most recent pronouncement, *Dennis v. Sparks*, —— U.S. ——, 49 U.S.L.W. 4001 (November 17, 1980), the purpose of immunizing judges has been clearly stated: "the point . . . is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, ——, 100 S.Ct. 402, 409 (1979). To allow attorney's fees against judges would be to defeat this purpose. Such fee allowances would inescapably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.) *cert. den.* 339 U.S. 949 (1950).

The threat of a $50,000 award for attorney's fees is no less disconcerting to a potential defendant than is the threat of a $50,000 award for damages. Respondents apparently contend, however, that judges will not be influenced by attorney's fee awards because such awards will be paid from public funds.[1] This argument—that an award directly against a judge would be intimidating, but that an award against public funds is a matter of no concern to the judge—both overstates the practical impact of the former award and understates the impact of the latter.

An award against a judge in his individual capacity, if it were not barred by judicial immunity,[2] would probably be

[1] It should be emphasized that the instant Respondents disavow any claim of attorney's fees against the Petitioners in their individual capacities. The attorney's fees sought, and awarded by the court below, were awarded against Petitioners in their official capacities. Such awards are payable from public funds and not by the individuals involved. Hutto v. Finney, 437 U.S. 678 (1978).

[2] It is undisputed here that such an award is absolutely barred by judicial immunity.

paid in practice from public funds. This is the case because many states, including Minnesota, authorize the idemnification of public officers for liabilities unintentionally incurred by them in good faith in the course of their duties. *See, e.g.*, Minn. Stat. § 3.736, Subd. 9 (1978). Moreover, the suggestion that judges would be unaffected by awards against the funds of their offices does scant justice to their sense of public responsibility. The prospect of large, if not crippling, fee awards against the public funds with which they are entrusted would be profoundly disturbing to all conscientious jurists. This concern would be heightened both by the dramatic proliferation of § 1983 suits in recent years, and by the fact that attorney's fee awards of $50,000 and more are becoming commonplace. Only the most sanguine observer would insist that such a continuing risk would not influence judicial decision-making, if only subtly and subconsciously.

This intimidating influence would be enhanced by the fact that fee awards under § 1988 are to be collected "*either directly from the official, in his official capacity, from funds of his agency or under his control*, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976), U.S. Code Cong. & Admin. News (1976), 5908, 5913 (emphasis added). Unlike heads of sprawling governmental departments, judges do not typically have at their disposal vast budgets capable of absorbing unforeseen costs of this magnitude. Instead, the effect of imposing fee awards would be to send state judges, hat in hand, to legislatures for a special appropriation to pay each fee award.

Further, the many state judges who are elected to office will be held accountable to the electorate for having subjected taxpayers to substantial awards for costs. Yet, as this case illus-

trates, such costs could be imposed without even an allegation, much less proof, that the judge had acted in bad faith. Liability for costs would thus be both unfair and likely to have a direct and very personal effect on the judge.

That costs such as attorney's fees can indeed affect officials' decision-making is demonstrated by this Court's own decision in *Hutto v. Finney*, 437 U.S. 678 (1978).[3] There, this Court described attorney's fees as one of the "financial penalties" which may be used as "effective enforcement weapons" to elicit compliance with an injunction. *Id.*, 437 U.S. at 690. The Court noted that "the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation." *Id.*, 437 U.S. at 695, n.24. Because this "weapon" can indeed shape the actions of officials, even when fees are awarded against public funds, it would be disingenuous to assert that the prospect of such costs will not have an intimidating effect.

Should § 1988 be read, then, as abrogating judicial immunity? Such an abrogation is not lightly to be inferred. *Pierson v. Ray, supra*; *Bauers v. Heisel, supra*; *cf. Tenny v. Brandhove*, 341 U.S. 367 (1951). Judicial immunity is so firmly established that this Court concluded in *Pierson v. Ray, supra*, 386 U.S. at 554, 555, that "Congress would have specifically so provided had it wished to abolish the doctrine."

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[3] Hutto v. Finney, supra, held that the Eleventh Amendment does not bar an award of attorney's fees against a State in conjunction with the issuance of declaratory and injunctive relief. The absence of such an Eleventh Amendment bar, however, offers no guidance in determining whether, as against judicial officers, there remains a bar of judicial immunity. The policies of federalism which inform Eleventh Amendment analysis are also present here, because § 1983 actions would place federal courts in the position of enjoining state judges, but the policies which give rise to judicial immunity are entirely distinct, and are independent of the concerns considered in Hutto.

In this area, where the immunity in question is so deeply-rooted, and where sensitive issues of federalism are implicated, the Court should not infer an abrogation of immunity in the absence of explicit statutory language.[4] Here, the statute contains no such language. Instead, the Court of Appeals looked to the legislative history, and rested its decision upon a single paragraph in the House Report stating that counsel fees are to be available "in some cases, [where] immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H. Rep. No. 94-1558, 94th Cong., 2d Sess., 9 (1976). The Report contains no express reference to judicial immunity, but the Court of Appeals inferred an intent to abrogate that immunity from the general reference to "immunity doctrines" and from the Report's citation of *Pierson v. Ray, supra,* along with two cases involving the qualified immunity of executive officials.

Ironically, it is the *Pierson* case which establishes that an intent to abolish judicial immunity must be expressly stated. Surely, if Congress had intended such an abrogation, the citation to *Pierson* is evidence of its awareness of the need to do so explicitly. Because *Pierson* involved not only a judge, but also police officers, and established the "special defenses" of good faith and probable cause for police officers, the House Committee's citation to *Pierson* is at most ambiguous, and can equally be understood as referring to these "special defenses." Something more than this is required to abolish a principle so deeply rooted in our history and so essential to an independent judiciary.

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[4] Cf. Hutto v. Finney, supra, 437 U.S. at 706 (Powell, J. *concurring in part and dissenting in part*). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 Harv.L.Rev. 682, 695 (1976).

II. JUDICIAL IMMUNITY BARS SUITS AGAINST JUDGES FOR INJUNCTIVE OR DECLARATORY RELIEF UNDER 42 U.S.C. § 1983

Because the policies supporting judicial immunity in damage actions are equally applicable to an award of attorney's fees, such an award is barred by immunity, whether or not judges are absolutely immune from suits for prospective relief under § 1983. Thus, the Court need not reach the question—which it has not addressed, *Supreme Court of Virginia v. Consumers Union*, —— U.S. ——, ——, 100 S.Ct. 1967, 1976 (1980)—whether judicial immunity bars declaratory or injunctive relief. If the Court does reach the issue, however, the considerations which give rise to judicial immunity from other civil actions, and to the absolute immunity of legislators, are equally apposite, and compel the conclusion that judicial immunity from civil suits is absolute. Where such absolute immunity exists, there can be no award of attorney's fees. *Supreme Court of Virginia v. Consumers Union, supra*, —— U.S. at ——, 100 S.Ct. at 1978.

The lower federal courts are divided on the propriety of suits for prospective relief, *see Supreme Court of Virigina v. Consumers Union, supra*, —— U.S. at ——, n.13; 100 S.Ct. at 1976, n.13. The rationale of this Court's judicial immunity decisions, however, supports the view that judicial immunity extends to all civil suits, regardless of the nature of the relief sought. *See e.g., Conover v. Montemuro*, 477 F.2d 1073, 1104 (3d Cir. 1973) (Aldisert, J., *concurring*); *Zimmerman v. Spears*, 428 F.Supp. 759, 761 (W.D. Tex. 1977); *Mirin v. Justices of Supreme Court of Nevada*, 415 F.Supp. 1178 (D. Nev. 1976); *Atchley v. Greenhill*, 373 F.Supp. 512, 514, 515 (S.D. Tex. 1974), *aff'd* 517 F.2d 692 (5th Cir. 1975), *cert. den.*, 424

U.S. 915 (1976); *Smallwood v. United States*, 358 F.Supp. 398, 403 (E.D. Mo. 1973), *aff'd* 468 F.2d 1407 (8th Cir. 1973); *Mackay v. Nesbitt*, 285 F.Supp. 498, 502, 503 (D. Alaska 1968), *aff'd* 412 F.2d 846 (9th Cir. 1969), *cert. den.* 396 U.S. 960 (1969).

In case after case, this Court has emphasized that judicial immunity is necessary to protect judges against the harrassing and intimidating influence of being compelled to defend themselves in vexatious civil actions. This burden inheres in any civil action, regardless of the nature of the relief sought or the ultimate outcome of the case. Judicial immunity reflects the conviction that a judge:

> . . . should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, supra, 386 U.S. at 554.

Similarly, in *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 347, this Court stated that "[l]iability to answer to everyone who might feel himself aggrieved by the action of the judge . . . would destroy that independence without which no judiciary can be either respectable or useful." Judicial immunity is thus a response to concern that:

> harrassment by unfounded litigation would cause a deflection of the [judge's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler v. Pachtman, supra, 424 U.S. at 422, 423 (referring to prosecutors, and to the common concerns justifying the immunity of prosecutors, judges and grand jurors). This danger is completely independent of the nature of the civil action, or its final disposition. Even if a judge is certain of ultimate vindication, and thus is free from personal financial consequences, the risk of having to *defend* a suit may nevertheless be a substantial deterrent to fearless action. *Cf. Imbler v. Pachtman, supra,* 424 U.S. at 438, n.4 (White, J., *concurring*).

In this respect, judges are precisely analogous to legislators. To preserve legislative independence, legislators must be protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). State legislators and Members of Congress are thus immune from all civil actions, regardless of the relief sought, because " 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' " *Supreme Court of Virginia v. Consumers Union, supra,* —— U.S. at ——, 100 S.Ct. at 1975, *quoting Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503 (1975). Even if the relief sought is wholly prospective, private civil actions may be used to delay and disrupt the legislative function. *Eastland v. United States Servicemen's Fund, supra.*

The potential for distraction, harrassment and disruption is at least as great in the judicial sphere. As the Court of Ap-

peals for the First Circuit observed in holding that judges, like legislators, are immune from § 1983 damage actions:

> Certainly it would be absurd to hold, in the application of the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators, in respect to immunity from civil liability for acts done in their official capacity.

Francis v. Crafts, 203 F.2d 809, 812 (1st Cir. 1953), *cert. den.* 346 U.S. 835 (1953).

Indeed, the case for immunity from prospective relief is stronger in the judicial than in the legislative sphere. This is true because immunity is justified in part by the existence of alternative forums and methods for vindication of individual rights. While few such remedies are available for correction of legislative abuses, "the law has provided for private parties numerous remedies" for the correction of judicial errors. *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 354. Judges, like legislators, are subject to impeachment. *Id.* In many states, they are also accountable at elections. Further, judges are subject to criminal punishment for any willful deprivation of constitutional rights. 18 U.S.C. § 242; *Imbler v. Pachtman, supra*, 424 U.S. at 429. Like prosecutors, they are also subject to professional discipline.

Moreover, apart from proceedings to punish or remove a judge, a disappointed civil litigant or criminal defendant has abundant opportunity to correct judicial errors.[5] Litigants

[5] The instant case illustrates the availability of alternative forums. As the Court of Appeals noted, the right-to-counsel issue involved in this action was asserted contemporaneously in an unrelated case, on an appeal from a defendant's conviction. The conviction was reversed, and the President Judge of the County Court of Common Pleas subsequently instructed the judges of his district to see that counsel were provided to all such defendants. Thus, this clear constitutional deprivation was capable of swift correction without the need to subject judges to a civil action.

are not only afforded an initial opportunity for hearing, but also an opportunity to invoke the judge's remedial powers in post-trial proceedings; to pursue an appeal; in criminal cases, to invoke state and federal post-conviction remedies; and, in proper cases, to obtain extraordinary writs. In many instances, the desired relief could also be attained by an action against other defendants, such as enforcement officers, who are not shielded by judicial immunity. *See, e.g., Supreme Court of Virginia v. Consumers Union, supra.*

This wide array of alternative forums makes absolute judicial immunity at least as defensible as the absolute immunity afforded legislators. To authorize further review of a judge's decision in § 1983 actions would in many cases necessitate a virtual retrial of the original action in a new forum, before a new judge. Such a retrial would defeat one of the fundamental purposes of judicial immunity, which is to prevent "the manifest injustice of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment of others." Prosser, *Law of Torts,* (Hornbook Series, 4th Ed. 1971) § 132 at 988.[6]

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[6] Further support for this view can be found in this Court's recent ruling that state legislators are insulated from suits for prospective relief. *Supreme Court of Virginia v. Consumers Union, supra,* —— U.S. at ——, 100 S.Ct. at 1974, 1975. The ruling was based in part on the fact that the Court's prior pronouncements on the subject had described legislators as immune from "civil liability" without distinguishing between damage actions and injunctive actions. The same observation may be made here. This Court has often described judges as immune from "civil liability", without distinguishing between damage and injunctive actions. *See, e.g., Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 347 (citing the "exemption of judges from civil liability"). In *Pierson v. Ray, supra,* 386 U.S. at 555, n.9, for example, the Court stated flatly that "judicial immunity is a defense to an action under § 1983." As in the *Supreme Court of Virginia* case, the unqualified language of this Court's prior decisions supports an expansive reading of the scope of judicial immunity.

In addition to the burden of defending civil suits, the remedy of injunctive relief may itself have a chilling influence on judicial independence. Inherent in an injunction are the traditional sanctions for its enforcement, including imprisonment and fines for contempt. *Conover v. Montemuro, supra,* (Aldisert, J., *concurring*). These sanctions, by definition, are meant to alter the behavior of the parties against whom they are directed, and they are used both to punish noncompliance and to compensate prevailing litigants. *Cf. Hutto v. Finney, supra.* Such sanctions thus hold the same potential for inhibiting forceful decision-making as do damage remedies. The nature of injunctive relief, therefore, and, more importantly, the harrassing and intimidating effect of subjecting judges to civil litigation, both counsel against the abrogation of judicial immunity in § 1983 actions, even where the relief sought is wholely prospective.

CONCLUSION

The absolute immunity of judges from civil liability for their decisions is a deeply-rooted principle essential to the integrity and independence of the judiciary. The concerns which give rise to that immunity are as applicable to an allowance of costs as they are to an allowance of damages, and preclude an award of attorney's fees under 42 U.S.C. § 1988. *Amici curiae* join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Court of Appeals.

Dated: December 9, 1980.

Respectfully submitted,

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No. 80-620

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN H. AYOOB, et al.,

Petitioners,

v.

PATRICIA MORRISON, et al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF FOR THE PENNSYLVANIA BAR ASSOCIATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Pennsylvania Bar Association hereby moves for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. The consent of Petitioner's counsel has been obtained and lodged with the Court. The consent of counsel for Respondents was requested but withheld.

The Pennsylvania Bar Association is a non-profit corporation founded in 1895 which represents more than twenty thousand lawyers. Since its inception the Association has been active in expressing and implementing considered views on local, state and national matters affecting the judiciary. The Association pioneered an effective disciplinary system for both lawyers and judges. The Association's long-standing and widely recognized role relative to judicial issues generally, and such specific issues as judicial merit selection and retention,

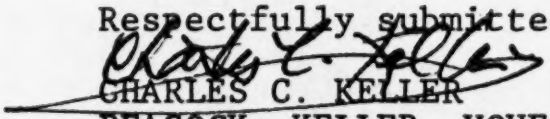
attests to its commitment to maintaining the integrity and independence of the judiciary.

As a consequence, the Association wishes to address the issue of whether the common law doctrine of judicial immunity bars an award of attorney's fees against judicial officers or related state and local agencies. While Petitioners have ably addressed many facets of this issue as applied to the specific facts of their own case, the Association proposes to address this issue in a more generic fashion stressing policy considerations applicable to the entire judiciary. Moreover, while avoiding redundancy, the Association nevertheless hopes to set forth many arguments not addressed or fully developed by the Petitioners.

In summary, the Association believes that its contribution will assist the Court in resolving this complex and weighty issue. The Pennsylvania Bar Association

therefore respectfully prays that its motion for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari be granted.

Respectfully submitted,



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INTEREST OF THE PENNSYLVANIA BAR ASSOCIATION

Every practitioner of law, indeed every citizen, has a deep and abiding concern in the integrity and independence of the judiciary. Representing over twenty thousand lawyers, the Pennsylvania Bar Association has repeatedly demonstrated this concern by addressing actions or decisions which may undermine this independence.

The Association believes that if judicial officers or related state and local agencies are held liable for the payment of attorney's fees in any case, the independence of the judiciary as well as the administration of justice will be severely impaired. The judge qua judge must be free to exercise his considered judgment without apprehension of personal consequences to himself. Additionally, the ability to recruit and maintain a qualified judiciary against the backdrop

of personal or systemic liability for attorney's fees will be cast into serious doubt.

Consequently, the issue of whether the doctrine of judicial immunity bars the award of attorney's fees against judicial officers or the judiciary systems of which they are a part is of vital concern to the Association. The Pennsylvania Bar Association therefore respectfully requests this opportunity to express its views to the Court in the belief such views will present an important and different approach which will be of benefit to the Court in considering the issues raised.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals held that Congress intended to abrogate the doctrine of judicial immunity when it passed 42 U.S.C. § 1988. Given the adverse affect this will have on the independence of the judiciary, this Court should review this decision.

The doctrine of judicial immunity serves the important purpose of maintaining the independence of the judiciary. Imposing attorney's fees on judges will do irreparable harm to the doctrine. The very same purposes served by the doctrine warrant insulating judges from awards of attorney's fees.

The Act must be strictly construed as it is in derogation of the common law. Congress did not clearly or expressly intend to abrogate the doctrine of judicial immunity by passing the Act.

ARGUMENT

The Pennsylvania Bar Association is one of the oldest and most distinguished bar associations in the nation. Throughout its long history, the Association has actively lobbied for a strong and independent judiciary while at the same time contributing to the creation of a system of judicial accountability. Although the Association clearly recognizes the strong policy arguments supporting the Civil Rights Attorney's Fees Awards Act, 42 U. S.C. §1988, the Association nevertheless believes that an award of attorney's fees against judicial officers or related state and local agencies will severely undermine the conflicting and even stronger policy requiring independence of the judiciary and, therefore, the administration of justice. Consequently, the Pennsylvania Bar Association respectfully requests that this Court issue a Writ of Certiorari to the Third Circuit Court of Appeals and review and

reverse its judgment in this case.[1]

The holding of the court below clearly goes beyond either the holding or implication of the prior decisions of the Supreme Court. That holding was that the defendant judicial officers were not protected in their judicial actions by judicial immunity from the demand for attorney's fees under 42 U. S. C. §1988.

The doctrine of judicial immunity has been consistenly adhered to by this Court for over a century. In Randall v. Brigham, 7 Wall. 523 (1869), the Court held that a state judge was immune from liability for the alleged wrongful removal of an attorney's name from the rolls of attorneys eligible to prac-

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1 Since a thorough exposition of the factual circumstances of this case as well as the various issues relating to judicial immunity are contained in the Petition for Writ of Certiorari, the Petition is incorporated herein as though fully set forth at length.

tice in that jurisdiction. In Bradley v. Fisher, 13 Wall. 335 (1872), the Court held that a justice of the Supreme Court of the District of Columbia was immune from liability for his judicial acts, even when such acts were in excess of his jurisdiction or alleged to have been done maliciously and corruptly. Later, the Court held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U. S. C. §1983, since the legislative record gave no indication that Congress intended to abolish this long established principle. Pierson v. Ray, 386 U. S. 547 (1967). More recently, in Stump v. Sparkman, 435 U. S. 349 (1978), the Court held that a state judge who had sanctioned the sterilization of a retarded woman was immune from liability and that such immunity would be set aside only if a judge acted

in the clear absence of of all jurisdiction.

In Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967 (1980), the Court held that the legislative (rule-making) actions of judicial officers qualified for legislative immunity from liability for attorney's fees. In that decision, there is a fleeting and inconclusive reference to the applicability of §1988 to judicial actions. The Court noted that the issue of whether judges are insulated from declaratory or injunctive relief with respect to their judicial acts (as was involved in the instant case) has never been resolved. Id. at 1976. So far as attorney's fees are concerned, the Court suggested that while Congress did not intend to abrogate legislative immunity in promulgating the Act, it did intend for attorney's fees to be awarded against defendants who would be otherwise immune from damages awards citing H. R. Rep. No. 94-1558, 94th

Cong., 2d Sess., 9 (1976). Supreme Court of Virginia, 100 S. Ct. at 1978.

Issuing the Writ of Certiorari to the Third Circuit Court of Appeals will afford this Court the opportunity to decide the troubling issue as to the proper interplay between common law immunities, such as the doctrine of judicial immunity, and §1988.

The doctrine of judicial immunity is deeply rooted in the common law. From the decision of Randall v. Brigham, 7 Wall. 523 (1869), up to the recent decision of Dennis v. Sparks, 49 U.S.L.W. 4001 (1980), this Court has consistently adhered to the doctrine. Essentially, the doctrine reflects an awareness of the necessity of preserving an independent judiciary, totally immune from the fear of vexatious suits and personal liability. Additionally, it reflects the patent unfairness of expecting a judicial officer to freely and fairly render judgment on the

merits of any given case where he may be personally and financially responsible according to the judgment of others far removed from the normal system of judicial review.

> "This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necesssarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts."

Randall v. Brigham, 7 Wall. 535-36.

> "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly de-

> termined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility."

Bradley v. Fisher, 13 Wall. 348.

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decidion-making but to intimidation."

Pierson v. Ray, 386 U.S. at 554.

These quotations are illustrative only, and are by no means exhaustive.

What threat or challenge is sufficient to influence the independent conscience of a judge? Surely the threat or promise of criminal prosecution or civil damages against him personally would intrude into that conscience. Is the trans-

fer of the liability for damages to the judge's supporting administrative office or judicial system any viable insulation? Is there any measurable difference where the dollars are designated "damages," or "costs" or "attorney's fees?"

Judicial immunity is predicated not only on the need to immunize individual judges but the judiciary as a whole. The two are inextricably bound together. A judge's independence will be no less impaired if the system of justice of which he is an integral part bears the ultimate financial liability for his actions. Mere knowledge of taxing such a cost upon the system would play subtly upon any judge's exercise of his responsibilities.

It has been suggested that judicial immunity is predicated in part on "the notion that private rights can be sacrificed in some degree to the achievement

of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights." Stump v. Sparkman, 435 U.S. at 370-71, (dissenting opinion). There is no question that the indigent criminal defendants involved in this case were not foreclosed from the normal judicial process so far as redress of the alleged wrongs were concerned and that various avenues for doing so were open to them. Separate and apart from these judicial avenues for redress, the system of judicial inquiry and review that has been erected in the Commonwealth of Pennsylvania (see Petition for Writ of Certiorari) insures judicial accountability while safeguarding the integrity and independence of the judiciary.

Is judicial immunity simply an outmoded vestige of the immunity enjoyed by kingly sovereigns? Is it worth preserving? The Pennsylvania Bar Associa-

tion is firmly convinced that there are some elements of America's peculiarly complex form of democratic government which are critical to its survival. A realistic system of checks and balances among the three branches of government is one such element. Another is the effective independence of the judiciary.

We firmly believe the abrogation or dilution of judicial immunity by making judges accountable for attorney's fees will have an impact which is not just chilling but, indeed, freezing on the performance of judges and the judicial system of which they are a part. If this Court concludes that the doctrine of judicial immunity has no application to the award of attorneys fees in this case or that the doctrine has been abrogated to some extent, it will do so only at the expense of the strong policy arguments which this Court has consistently enunciated for over a

century. To do so, this Court must examine the origin and purposes of the Act. It is therefore important that this Court carefully examine the Act in question and, in weighing the intent behind it, carefully balance the full impact of the competing policies.

The Civil Rights Attorney's Fees Awards Act, being in derogation of the common law, must be strictly construed, for "no statute is to be construed as alternating from common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." Shaw v. North Pennsylvania Rail Co., 101 U. S. 557, 565 (1880), quoted in Herd & Co. v. Krawill Machine Corp., 359 U. S. 297, 304-05 (1959). This Court has applied this rule with reference to the issue of judicial immunity. In Pierson v. Ray, supra, the Court concluded that judges remained immune from

damage liability under 42 U.S.C. §1983.

> "The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities... .The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

386 U. S. at 354-55 (citations and footnotes omitted). Confronted with the question of whether the Act abrogated the immunity of judges with respect to their legislative function, the Court held in Supreme Court of Virginia v. Consumers Union, supra, that, absent an express indication to the contrary, Congress cannot be presumed to have changed the common law rule.

In the present case, the Court of Appeals relied on the House Report to conclude that Congress expressly considered judicial immunity and decided to abrogate it under the Act. H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 2. The House Report states:

"Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, civil and constitutional rights are to be adequately protected."

Id. at 9. The Court noted in particular that since one of the three cases cited in footnote 17 was Pierson v. Ray, supra, Congress clearly must have intended to abrogate the doctrine of judicial immunity.

Reliance on this isolated reference by the Circuit Court is at variance with the holding of this Court in Supreme Court of Virginia v. Consumers Union, supra. The legislative reference suggests an intent to make public officials liable for counsel fees where any immunity from damages exists. (Did they really mean to encourage suits without remedy-damages-by providing ready-made counsel fees?) But this Court, after noting the legislative reference, concluded

there was no evidence of legislative intent to award counsel fees in the face of legislative immunity. Nor is there a compelling reason to apply the remedy of counsel fees in derogation of judicial immunity.

It is improbable that Congress intended to abrogate these immunities and special defenses by such a vague and nebulous reference. The Congressional Record for this statute may be searched in vain to find any reference to the doctrine of judicial immunity. The Senate Report, S. Rep. No. 94-10011, 94th Cong., 2d Sess. 1, 1976, U. S. Code Cong. & Admin. News 5908 et seq., makes no reference to the doctrine of judicial immunity or any other immunity. Notably, it was the Senate version of the Act which ultimately passed. There are references throughout the debate in both the House and the Senate to the question of assessing attorney's fees against state and local officials. No

reference was made, however, to judges acting in their judicial capacities.

This is in marked contra-distinction to the abundance of references in the Congressional Record to the doctrine of judicial immunity which appeared in the debates surrounding 42 U. S. C. §1983. Pierson v. Ray, 386 U.S. at 559-63 (dissenting opinion). In the face of the specific references to judges being held liable for damages under §1983 in the Record, this Court concluded that there was no clear statement of Congressional intent to abrogate the doctrine of judicial immunity.

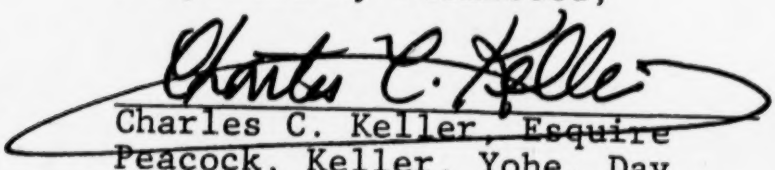
If the doctrine of judicial immunity is to be abrogated to any extent, Congress should do so expressly and by specific reference. Its failure to do so in the Act itself, viewed in the absence of any substantial or meaningful discussion of the doctrine or its purposes, makes it clear that Congress did not intent to abrogate

the doctrine. By issuing a Writ of Certiorari to the Third Circuit Court of Appeals, this Court will have the opportunity of resolving this compelling and timely issue once and for all.

CONCLUSION

The Pennsylvania Bar Association respectfully requests this Court to issue a Writ of Certiorari to the Third Circuit Court of Appeals and review its judgment and opinion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 1980, three copies of the within Motion and Brief were mailed, postage prepaid, to the following parties in accordance with the applicable Rules of the Supreme Court:

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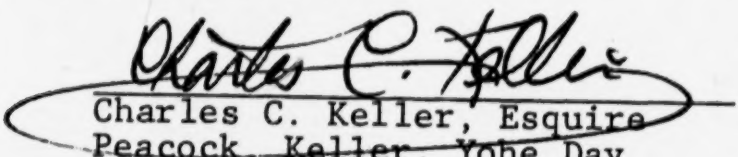

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December 8, 1980

MOTION FILED
DEC 9 1980

No. 80-620

In the
Supreme Court of the United States
OCTOBER TERM, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,
Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 80-620

In the

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

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Respondents.

On Petition for Writ of Certiorari
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MOTION OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

The Pennsylvania Conference of Trial Judges respectfully moves this court for leave to file the accompanying brief as *amicus curiae.* The consent of the attorney for the petitioner herein has been obtained, but the attorney for

the respondent herein refused to consent to the filing of a brief by the Pennsylvania Conference of Trial Judges as *amicus curiae.*

The Pennsylvania Conference of Trial Judges is an association recognized by the Supreme Court of Pennsylvania as the representative organization for all trial judges in the state, including judges of the Pennsylvania Courts of Common Pleas and the Municipal Court of Philadelphia County. The applicants have an interest in that the decision of the Court of Appeals for the Third Circuit will infringe on the independent performance of their official judicial duties and will subject them to the burden of defending themselves in consequent litigation.

The Petition for a Writ of Certiorari deals with the merits of the decision of the Court of Appeals for the Third Circuit. The Petition is inadequate in that it does not emphasize the necessity for the grant of the Writ. Applicant focuses attention on this issue in its brief.

WHEREFORE, The Pennsylvania Conference of Trial Judges respectfully requests this Court to permit it to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

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BRIEF OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATUTES

42 U.S.C. §1983 (Supp. 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1988 (Supp. 1980)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherin the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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to the United States Court of Appeals
for the Third Circuit

BRIEF OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE PENNSYLVANIA CONFERENCE OF TRIAL JUDGES

In the instant case the United States Court of Appeals for the Third Circuit held expressly that "judicial immunity is not a factor to be considered" in determining the propriety of an award of attorney's fees under 42 U.S.C. §1988 against judicial officials sued for injunctive and declaratory relief under 42 U.S.C. §1983 for actions taken concededly within the scope of their judicial duties. *Morrison v. Ayoob*, Civil No. 79-1923 (3d Cir., filed July 29, 1980) at 8b.

The court of appeal's decision amounts to a holding that judges are subject to suit under 42 U.S.C. §1983 and may be held liable for attorney's fees under 42 U.S.C. §1988 for errors of law.

The Pennsylvania Conference of Trial Judges is an unincorporated association made up of over 300 judges of the Pennsylvania Courts of Common Pleas and the Municipal Court of Philadelphia County, and is recognized as the official representative organization for the judges of Pennsylvania's courts of original jurisdiction. Its members stand in the front line in administering the Commonwealth's criminal and civil judicial systems, and deal directly with litigants whose dissatisfaction may lead to the filing of civil rights suits. Such suits may especially be feared from the large number of unsuccessful criminal defendants. The possibility of attorney's fee awards may well provide such incentive to litigation that the process of defending nonmeritorious suits will greatly infringe on the ability of the judiciary to carry on its official business in an efficient and expeditious manner. Even the potentiality of

such litigation will impose an extraneous and improper factor into the decision making process of the most conscientiously impartial judge.

For the foregoing reasons the Pennsylvania Conference of Trial Judges wishes to be heard on the issue of the propriety of the grant of the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The decision below raises an issue of great importance. In this brief *Amicus* shows that the lower court's holding with respect to jucicial immunity is in direct conflict with decisions of the First Circuit, the Sixth Circuit, and the Ninth Circuit, and that if left undisturbed, it would interferé with the due administration of justice in the state courts.

A. The Decision Below Conflicts with Decisions of Other Circuits

The Third Circuit's decision as to the scope of judicial immunity squarely conflicts with holdings of the First Circuit, the Sixth Circuit, and the Ninth Circuit, although it is lent apparent support by the holdings of the Second Circuit, the Fourth Circuit and the Seventh Circuit. The conflict concerns the propriety of subjecting judges to suits, regardless of the nature of the relief sought, under 42 U.S.C. §1983 for actions taken during the course of their official duties.

In *Stump v. Sparkman*, 435 U.S. 349 (1978) and in *Pierson v. Ray*, 386 U.S. 547 (1967) this Court recognized that the common law defense of judicial immunity applies to actions brought under the Civil Rights Acts. In

both of these cases and in the earlier cases of *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1869) and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) the immunity issue arose in the context of suits for damages. In the recent case *Supreme Court of Virginia v. Consumers Union of the United States*, 100 S.Ct. 1967 (1980) (hereinafter cited as *Consumers Union*) this Court expressly reserved decision as to whether judicial immunity would operate as a bar to the granting of declaratory or injunctive relief in a suit brought under 42 U.S.C. §1983. 100 S.Ct. at 1976.

This question, not expressly decided by this Court, has been presented to seven circuit courts of appeal. The results are inconsistent, a fact which this Court acknowledged in *Consumers Union*. 100 S.Ct. at 1976.

In *Heimbach v. Village of Lyons*, 597 F.2d 344 (2d Cir. 1979) suit was brought under 42 U.S.C. §§1983 and 1985 by residents of the Village of Lyons and members of organizations called the "Eastern Farm Workers Association" and "Citizens Committee to Save Water Street" against the Village of Lyons, members of its board of trustees, the village Justice of the Peace, the village Chief of Police, the village Building Inspector, and certain fictitious defendants. The complaint alleged that illegal efforts had been made by the defendants to evict low income people from their homes in certain areas of the village so that the Lyons Village Government could redevelop the area for business and commercial interests. The plaintiffs sought damages and declaratory and injunctive relief.

The district court dismissed the suit against all defendants. It ruled that the village Justice of the Peace was immune from suit since he was not acting in the clear absence of all jurisdiction.

The court of appeals did not disturb the district court's finding that the Justice of the Peace was not acting in the clear absence of all jurisdiction but nevertheless reversed the dismissal of the suit against the justice. The court held that

> while Justice Perry may have acted maliciously in signing a criminal arrest warrant...the justice is nonetheless immune from suit for damages for his actions. *The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action.* (emphasis supplied) 594 F.2d at 347.

The Fourth Circuit reached a similar result in *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). State prisoners incarcerated at the Central Correctional Institution at Columbia, South Carolina brought suit under 42 U.S.C. §§1983 and 1985 against various state and county officials seeking damages as well as equitable and declaratory relief. Plaintiffs alleged that defendants were violating their first and fourteenth amendment rights by prosecuting them and by suppressing the prosecution of others.

The district court granted motions to dismiss in favor of the Magistrate and Solicitor for the County of Richland South Carolina. The district court ruled that both defendants were immune from suit since the actions complained of concerned the exercise of their respective judicial and quasi-judicial immunity.

The court of appeals reversed the dismissals. The court held that

> on the basis of judicial immunity, the complaint...should be dismissed to the extent, but

> only to the extent that it seeks the recovery of money damages....*This immunity, however, protects qualified defendants only from claims for money damages. It does not extend to plaintiff's action for injunctive and declaratory relief under Section 1983, 42 U.S.C.* (emphasis supplied) 528 F.2d at 814.

The Seventh Circuit has also held that the doctrine of judicial immunity does not bar a suit seeking prospective relief. In *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975) a suit had been brought under 42 U.S.C. §1983 by a husband against a duly elected judge of the County Court of Racine County, Wisconsin and his wife's attorney. Plaintiff sought monetary relief as well as declaratory and injunctive relief.

The district court dismissed both the claim for monetary relief and the claim for prospective relief. The circuit court affirmed the dismissal. It agreed with the district court that a judge is immune to suit for damages. The court affirmed the dismissal of the claim for declaratory and injunctive relief on the basis that there no longer existed a live case or controversy, but not before noting:

> It is clear, as a matter of general principle, that declaratory and injunctive relief against a judge are not barred by the existence of judicial immunity from damages under the Civil Rights Act. 520 F.2d at 769.

By contrast, the First Circuit has not drawn a distinction between claims for monetary relief and claims for prospective relief when applying the doctrine of judicial

immunity. In *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) plaintiff brought a civil rights action under 42 U.S.C. §§1983 and 1985 alleging that certain officials of the Commonwealth of Massachusetts, including a Justice of the Superior court of Massachusetts, violated his constitutional rights by illegally wiretapping his telephone and using evidence obtained thereby at his criminal trial. The complaint sought declaratory relief and also compensatory and punitive damages.

The district court dismissed the action as to the Justice of the Superior Court on grounds of judicial immunity. On motion for summary affirmance under Local Rule 12 the court of appeals affirmed the dismissal. The court did not differentiate between the various claims for relief. As a result of its affirmance neither the claim for damages nor the claim for declaratory relief remained as against the Superior Court Justice. The result can only be explained by concluding that in the First Circuit the doctrine of judicial immunity operates as an absolute bar to suits brought against judges under 42 U.S.C. §1983 regardless of the form of relief sought.

The Ninth Circuit has also held that the doctrine of judicial immunity bars a "suit" against a judge, not simply a form of relief. *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964) involved an action under 42 U.S.C. §§1983, 1985 and 1986 against various government officials, including a judge of the Municipal Court of Los Angeles. The dispute arose out of the arrest and conviction of the plaintiff for violations of the Vehicle Code.

The court of appeals affirmed the district court's dismissal of the complaint as to all defendants. The court held the dismissal of the judge was proper because

> judges...are immune from *suit* under the Civil Rights Act for conduct in the performance of their official duties...."Judges are immune from *suit* arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and notwithstanding such acts may have been performed in excess of jurisdiction, provided there was not a clear absence of all jurisdiction over the subject matter." (emphasis supplied) 330 F.2d at 869, 870 (citing *Sires v. Cole*, 320 F.2d 877, 879 (9th Cir. 1963)).

The term "suit" clearly encompasses all forms of relief. If a judge is immune from "suit" for judicial acts it logically follows that the form of relief sought in the "suit" is of no importance. If the Ninth Circuit had meant otherwise, it certainly would not have chosen the term "suit" to define the scope of judicial immunity.

The holding of the Sixth Circuit in *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) is in accord with the holdings of the First Circuit and the Ninth Ciruit. In *Azar* an action was brought under 42 U.S.C. §§1983, 1985(3) and 1986 against twenty-seven defendants including two judges of the Municipal Court of Akron, Ohio. Plaintiffs, eight members of the Azar family, alleged that defendants denied them their civil rights by refusing to take any action in the face of active harassment and intimidation of the Azar family by the defendant Conley, an Akron police officer. Plaintiffs sought injunctive relief in addition to damages.

The district court dismissed the complaint on a variety of grounds. As to the two judges of the Municipal Court, the district court held that they were immune

from suits under the Civil Rights Act. The Sixth Circuit affirmed noting that "(t)here is no claim here...that the judges acted 'in absence of all jurisdiction' " 456 F.2d at 1388. The court did not differentiate between the various claims for relief but its holding leaves little doubt that in its opinion judicial immunity does not depend on the type of relief sought. Its affirmance relieved the two judges of the Municipal Court from the necessity of defending against the claim for injunctive relief.

The Third Circuit by its decision below has aligned itself with the Second Circuit, the Fourth Circuit, and the Seventh Circuit. The court below was aware of this Court's decision in *Consumers Union* since that case was cited in its opinion. In *Consumers Union* this Court held that there is nothing in the legislative history of 42 U.S.C. §1988

> to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute...immunity. The House committee report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards,...but there is no indication that Congress intended to permit an award of attorney's fee to be premised on acts that themselves would be insulated from even prospective relief. 100 S.Ct. at 1978.

In awarding attorney's fees to Respondents the court below was clearly of the opinion that judicial immunity is not a bar to prospective relief under 42 U.S.C. §1983.

The scope of judicial immunity is thus quite different in the seven circuits. In the Third Circuit, the Second Circuit, the Fourth Circuit, and the Seventh Circuit, a judge is immune with respect to a request for damages in a suit brought under 42 U.S.C. §1983 but not with respect to a request for prospective relief. In the First Circuit, the Sixth Circuit, and the Ninth Circuit a judge is absolutely immune from suit under 42 U.S.C. §1983 regardless of the relief sought. Uniform application of 42 U.S.C. §1983 requires that this Court review the Third Circuit's decision and resolve this important issue of judicial immunity.

B. The Issue Presented In This Case Is Of Paramount Importance To The Federal System and Has Not Been Decided By This Court

The costs of allowing actions under 42 U.S.C. §§1983 and 1988 against state judges would be significant. Federal courts would have a say in the allocation of state resources to state judiciaries. States would be forced, directly or indirectly, to provide resources for the defense of judges and for the reimbursement of attorneys fees for successful plaintiffs. States would in addition be required to provide additional judicial resources to compensate for the time lost by their present judges while engaged in defending themselves. The cost in terms of judicial resources cannot be presumed to be insignificant to the federal judiciary as well. This Court may take notice of the extraordinary number of *habeus corpus* petitions filed in federal courts even without the inducement of attorneys fees.

An additional cost to be considered is the abandonment of the advantages afforded by judicial immunity.

This Court has long recognized that judicial immunity is beneficial to a proper administration of the law.

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. *Bradley v. Fisher, supra* at 348.

See also *Pierson v. Ray, supra.*

Whatever benefits may be gained do not justify the foregoing costs. Civil rights actions under 42 U.S.C. §1983 are not available to enjoin ongoing criminal prosecutions except under extraordinary circumstances. *Younger v. Harris,* 401 U.S. 37 (1971). They cannot serve as a substitute for writs of *habeus corpus. Prieser v. Rodriquez,* 411 U.S. 475 (1973). Such actions cannot be used to redress the grievances of those who have suffered past exposure to illegal conduct, since those individuals would lack standing without an allegation of continuing, present adverse effects, *O'Shea v. Littleton,* 414 U.S. 488 (1974). The only instance in which prospective relief would be proper, in the absence of judicial immunity, is when a plaintiff alleges that illegal judicial conduct is accompanied by present adverse effects.

Even though relief is seldom available this Court has recognized that "(f)ew persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the act which would be essential to the maintenance of the action." *Bradley v. Fisher, supra* at 348. Thus the friction between the federal and state judiciaries, which this Court has been so concerned to prevent in cases such as *Younger v. Harris, supra,* and its progeny may well manifest itself. The federal judiciary, presently overburdened, will find itself in the unenviable position of having to determine the propriety of countless claims filed against state judges.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of United States Court of Appeals for the Third Circuit.

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No. 80-620

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHEAL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND

BRIEF AMICUS CURIAE OF THE HONORABLE ALEXANDER F. BARBIERI, ADMINISTRATOR OF PENNSYLVANIA COURTS, IN SUPPORT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief Amicus Curiae of the Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, in Support of the Petition for Writ of Certiorari

THE INTEREST OF THE HONORABLE ALEXANDER F. BARBIERI IN THESE PROCEEDINGS

The United States Court of Appeals for the Third Circuit stated that the district court could fix liability for the payment of attorneys' fees upon the Administrator of Pennsylvania Courts because the circuit court determined that the court administrator "actively participated in all phases of the case" (Slip Opinion at pp. 7-8). This statement is clearly erroneous insofar as the court administrator never entered his appearance, nor did he participate in the proceedings other than to provide legal representation to the district magistrate defendants, pursuant to his official duties. For these reasons, Judge Barbieri was not afforded notice or an opportunity to be heard on this issue.

Judge Barbieri serves the judiciary of Pennsylvania by providing it legal counsel. In this brief, he provides all the judges of Pennsylvania an opportunity to be heard on a most critical issue, the substantial abrogation by the circuit court of the Common Law principle of judicial immunity, which until now insured that the public had access to impartial tribunals capable of affording due process in an atmosphere unencumbered by the fear of litigation and harassment.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

The Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, submits this brief in *amicus curiae* pursuant to Rule 36.4 of the United States Supreme Court Rules.

MOTION FOR LEAVE TO FILE

Alternatively, consent for the filing of this brief having been refused by counsel for the Respondent, Judge Barbieri moves this Honorable Court to accept this brief on behalf of, in part, the judicial branch of the Commonwealth of Pennsylvania, which is represented at all times and in all proceedings by the Legal Department of the Administrative Office of Pennsylvania Courts. (The Office of the Attorney General of Pennsylvania does not represent the judicial branch [see p. 30b of Petitioner's Appendix]).

ARGUMENT

At issue in this case is whether, by enacting the Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 (Supp. 1980) ("1988"), Congress intended to abrogate the Common Law doctrine of absolute judicial immunity with respect to fee awards, and if it did so intend, whether that action of the legislative branch was violative of the constitutional guarantee of Due Process and of the principle of Separation of Powers.

I. The court below erred in concluding: (1) that this Court conceded that Congress could abolish the Common Law doctrine of judicial immunity at will; (2) that Congress in the passage of 42 U.S.C. §1988 provided a clear indication and a specific provision which manifest an intent to abolish the doctrine. Aside from these commissions of error, the opinion of the Third Circuit Court of Appeals does not consider the interests competing in this issue to the degree necessary to engender confidence in the result — one of far-reaching and catastrophic dimensions.

One question presented to the United States Court of Appeals for the Third Circuit in this matter was whether the doctrine of judicial immunity bars recovery of attorneys' fees by a prevailing party under §1988 from judicial officers in their official capacity. That court held that it did not.

The court below reached this erroneous conclusion using a two-step analysis. Firstly, the court inferred, and it is submitted, incorrectly, that this Court indicated in *Pierson v. Ray*, 386 U.S. 547, 554-55, 18 L.Ed. 288, 295, 87 S. Ct. 1213 (1967), that Congress may abolish the doctrine of judicial immunity, adopted by this Court in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872), when it sees fit (elsewhere in this petition, it is submitted the legislative branch cannot do so without violating the Constitution).

What this Court held in *Pierson v. Ray, supra,* was that this settled principle of the law was not abolished by 42 U.S.C. §1983. The Court observed that the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. The Court would not presume that an abrogation had been attempted without a specific provision to that effect. What was not determined in *Pierson* was whether Congress had the right to abolish the doctrine of judicial immunity adopted by this Court in *Bradley v. Fisher, supra.*

It is a basic proposition that this Court will adopt one of two possible constructions of a statute which will save and not destroy it, and the Court will not attribute to Congress an intent to defy the due process clause of the Fifth Amendment to the Constitution of the United States or even to come so near to doing so as to raise serious questions of constitutional law. *Anniston Mfg. Co. v. Davis,* Ala. 1937, 57 S. Ct. 816, 301 U.S. 337, 81 L. Ed. 1143, rehearing denied. 58 S. Ct. 3, 302 U.S. 772, 82 L. Ed. 599. Thus, when this Court concluded that Congress, in the passage of 42 U.S.C. §1983, did not manifest an intent to abolish judicial immunity, it did not of necessity conclude that had Congress meant to do so, it would have had a commensurate right.

That this Court in *Pierson v. Ray, supra,* was construing §1983 to save it is evidenced by the Court's repetition immediately prior to its holding on this issue of the language in *Scott v. Stansfield.* L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra,* 349; note, at 350, 20 L.Ed. at 650:

> . . . it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

The Court continued:

> It is the judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants.
>
> . . .
>
> . . . he should not have fear that unsatisfied litigants may hound him with litigation . . . . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Having first stated that the doctrine of judicial immunity preserved the independence of the judiciary to the sole benefit of the public, it is submitted the Court cannot be said to have tacitly conceded that Congress, while not intending that time to abolish this keystone of judicial process, could do so at any time it liked.

The second step in the Third Circuit's analysis was the conclusion that the legislative history of §1988 indicated that Congress expressly considered judicial immunity and decided to abrogate it.

It is submitted that the conclusion which the lower court would have to have reached not to err is that Congress has given a clear indication in the form of a specific provision. See *Pierson v. Ray, supra,* at 18 L.Ed. 294-295. As Petitioner observes, the evidence of Congressional intent is at best ambiguous and could hardly be considered a specific provision of the sort necessary to manifest a Congressional intent to abolish a well and solidly established common law doctrine necessary for proper judicial function. See *Pierson v. Ray, supra,* 18 L. Ed. at 294-295.

The abolition of the doctrine of absolute judicial immunity, assuming arguendo that this is an appropriate and lawful action, should not occur at the instance of a legislative footnote or on the basis of an appellate opinion that ignores totally the conflicting policy issues which

must be addressed before confidence in a result will be instilled in the judiciary and the public served.

II. Assuming arguendo that Congress intended to abolish judicial immunity with the passage of the Attorneys' Fees Awards Act, this action by the legislative branch of government is in violation of Constitutional guarantees of fundamental fairness and due process.

The Fifth Amendment to the Constitution of the United States announces and reaffirms the ancient principles of Common Law and prevents them from being unjustly invaded by the power of the federal government.

This clause is a restraint and limitation on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process "due process of law" by mere will. *Murray v. Hoboken Land, etc., Co.*, N.J. 1856, 59 U.S. 277, 18 How. 277, 15 L. Ed. 372. The amendment forbids the federal government from depriving any person of life, liberty or property without due process of law. *Bloom v. State of Illinois*, Ill. 1968, 88 S. Ct. 1477, 391 U.S. 194, 20 L. Ed.2d 522. And it is this Court which is the final arbiter of due process under the Constitution. *Gallagher v. Quinn*, 1966, 363 F.2d 301, 124 U.S. App. D.C. 172, cert. denied 87 S. Ct. 167, 385 U.S. 881, 17 L. Ed. 2d 108.

Due process of law guaranteed by the Fifth Amendment is a primary and indispensable foundation of individual freedom. It expresses in its ultimate analysis respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization. Judicial immunity which guarantees that parties will receive a fair trial in a fair tribunal is a basic requirement of due process and is an ancient doctrine whose intent it is to prevent even a probability of unfairness. The right to fair trial may not

be abrogated under any circumstances, e.g., even if evidence of guilt of a criminal defendant is overwhelming. *Imbler v. Craven,* D.C. Cal. 1969, 298 F. Supp. 795, affirmed 424 F.2d 631, cert. denied, 91 S. Ct. 100, 400 U.S. 865, 27 L. Ed. 2d 104. The influences from which the tribunal must be guarded against to insure that a fair trial is afforded have been enumerated and delineated extensively in the area of jury trials, because, up until the point of the Third Circuit's action in this matter, the judiciary's freedom from influence was assured. For example, where outside influences affecting a community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable safeguards, such as change of venue, to assure a fair and impartial trial. *Pamplin v. Mason,* C.A. Tex. 1966, 364 F.2d 1. Under the holding of the Third Circuit in this matter, however, there is no escape to another locality, for all judges must now stand in fear of the litigants before them, with the result that no litigant can be assured of receiving due process.

The independence of the judiciary from vexatious lawsuits of dissatisfied parties and from the branch of government which would be called upon to indemnify a judge against whom a judgment has been obtained must remain intact to avoid a chill on the unbiased discretion and decisions of judicial officers.

Absent a cloak of judicial immunity, the very source of justice would be poisoned, and a system would be introduced that could best be characterized as servile and incapable of impartiality as it was conceived in the concept of due process. See *Taaffee v. Downes,* 13 Eng. Rep. 15, 17 (C.P. Ireland, 1813); *Lining v. Bentham,* 2 S.C.L. (2 Bay) 1, 3 (1796). Examined from another point of view, the doctrine of immunity insures that there is some finality in the judicial proceedings — some point in the administration of the law where unqualified confidence is to be reposed and acknowledged. Further, where a judge must spend one hour at the bar — next at

the bench, of the same or some other court, he will have a busy and harassing time, getting from one point to the other — from the Judge to the accused — from the corrector to the corrected. Thus, it is a great diseconomy and disservice to the public to poison the wells of justice for the sake of providing an incentive to civil rights litigants where one of the greatest civil rights of all, due process, is destroyed in the balance.

Without the doctrine of immunity, responsible and capable persons will be discouraged from seeking judgeships, for they will be unwilling to risk their property and time defending against litigants offended by adverse decisions. And, as the Petitioners observe, the imposition of attorneys' fees on those who are judges produces no different effect upon judicial discretion and decision making processes than does the imposition of damages. Quite simply, there is no distinction between damages and awards which justify the abrogation of what this Court referred to as a solidly established policy of judicial independence for the benefit of the public. *Pierson v. Ray, supra,* 18 L. Ed.2d 294-295.

While it may be argued that because the government unit the judges serve will actually pay the fee awards and that, therefore, judicial independence will remain unencumbered, this logic is faulty. Firstly, were this the case, no harm would come from the assessment of damages. Secondly, the award against the judge would be reported to the public as such, creating in the judge's mind a fear that confidence in his abilities will be eroded no matter who pays the bill. Thirdly, the state may develop defenses or otherwise delay in paying awards, with the effect of making the judiciary dependent on that branch which disburses the funds.

The policy behind judicial immunity, i.e., insuring that there is some place where the probability of receiving due process is maximized, must not be abrogated, let alone summarily, either by the legislature or the judiciary.

III. Under the principle of separation of powers, the legislature is prohibited from encroaching on, or unduly burdening or interfering with, the judicial department in its exercise of judicial functions. Congress could not abrogate judicial immunity without violating this principle.

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. *Dennis v. Sparks, etc.*, 49 U.S.L.Week 4003 (U.S. November 17, 1980).

Independence from that branch of government which would be called upon to indemnify the judiciary is equally necessary to avoid a posture of servility. Also to be avoided is the risk that another branch of government will impose upon the judiciary informal or formal sanctions for the latter's loss of a controversy.

The constitutional measures for controlling the judiciary are appellate process, criminal prosecutions, see *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974), legislation running to jurisdiction and powers, peer review and the like. But, when the power of the judiciary is eroded to the extent that due process cannot be afforded with ease, the judiciary is no longer a co-equal branch of government, for it can no longer perform the function for which it exists.

An examination of this Court's most recent opinion in the case of *Dennis v. Sparks, etc.*, 49 U.S.L.Week 4001 (U.S. November 17, 1980) reveals the extent to which judicial immunity is inherent and necessary to the operation of the judicial branch. There, this Court had an opportunity to decide that where a judge conspires to commit a judicial act for unlawful purposes (in *Dennis*,the violation of 42 U.S.C. §1983) the judge's part

in the conspiracy is not a judicial act, nor within his jurisdiction. Yet, this Court determined that judicial immunity attached under these circumstances. Because the judge was immune to a damage action in *Dennis*, attorneys' fees could not have been assessed under §1988. Yet, under the rationale of the case at bar, if the plaintiffs in *Dennis* had applied for injunctive relief and prevailed, attorneys' fees could have been awarded. This is antithetical to the concept of judicial immunity and internally inconsistent. If incentive for vindication of civil rights is not to be provided in damage actions, why should request for any other remedy which imposes financial liability be treated any differently?

IV. Fundamental concepts of due process were violated when the appellate court held that Judge Alexander F. Barbieri could, at the district court's discretion, be held liable for counsel fees where he received neither notice nor opportunity to be heard and where his only connection with the matter at bar was his provision of legal counsel to judicial defendants.

The State Court Administrator in Pennsylvania is a constitutional officer and his office is created by state statute. *See Pa. Const., Art.* V, §10; 42 Pa. C.S. §1901, *et seq.* The functions of the Administrator's Office are limited to those stipulated by the Supreme Court in its Rules of Judicial Administration. See Pennsylvania Rules of Judicial Administration, Pa. Rules of Court 1 (West, 1980). The Administrator is not responsible for the judicial conduct of district justices.

However, in Pennsylvania, the Legal Department of the Administrative Office of Pennsylvania Courts provides legal representation to the judicial branch of Pennsylvania government. This service is not provided by the Office of the Attorney General of the Commonwealth of Pennsylvania. While Judge Barbieri instructed the attorneys of the Legal Department to counsel the judicial de-

fendants in the proceedings below, at no time did those counsel enter their appearance on behalf of Judge Barbieri nor did Judge Barbieri actively participate in any phase of this case. Thus, the rationale of the United States Court of Appeals for the Third Circuit that because Judge Barbieri did enter his appearance and did participate he could be held responsible for attorneys' fees is clearly and absolutely erroneous. (Slip Opinion pp. 7-8).

Judge Barbieri was not a party to this litigation and was not interested in the result, being neither bound nor benefited by the resulting judgment. He neither participated in this litigation nor did he have an adequate opportunity to defend against the result which may make him responsible for attorneys' fees awarded. Even were it to be argued that the Court Administrator had an academic interest in the determination of a question of law, this is not a sufficient interest. *Bigelow v. Old Dominion Copper Mining & Smelting Co.* (1912), 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009.

That Judge Barbieri provided counsel to the defendants below pursuant to his duties as the Administrator of Pennsylvania Courts does not change the conclusion that he did not actively participate. See *McIlhenny Co. v. Gaidry* (CCA 5th, 1918) 253 F. 613; *Cofax Corporation v. Minn. Mining & Mfg. Co.*, (S.D.N.Y. 1947) 79 F. Supp. 842; *Thaxton v. Naughan*, (4th Cir. 1963), 321 F.2d 474, 479.

CONCLUSION

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 5th day of December 1980, I personally caused to be served by mailing, prepaid and first class, United States Mail, three copies of the Brief Amicus Curiae of the Honorable Alexander F. Barbieri, Administrator of Pennsylvania Courts, in support of the Petition for Writ of Certiorari, in the above matter, to:

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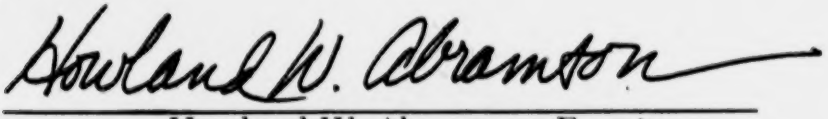

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